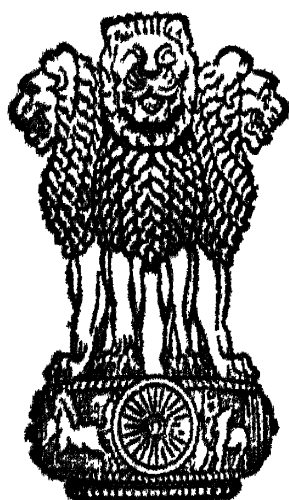

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MICHIGAN LEGAL STUDIES



THE CONFLICT OF LAWS

A Comparative Study

PUBLISHED UNDER THE AUSPICES OF THE UNIVERSITY OF MICHIGAN LAW
SCHOOL (WHICH, HOWEVER, ASSUMES NO RESPONSIBILITY FOR THE VIEWS
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OF MICHIGAN BY WILLIAM W. COOK

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MICHIGAN LEGAL STUDIES

Hessel E. Yntema, Editor

DISCOVERY BEFORE TRIAL

George Ragland, Jr.

TORTS IN THE CONFLICT OF LAWS

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THE AMENDING OF THE FEDERAL CONSTITUTION

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THE PREVENTION OF REPEATED CRIME

John Barker Waite

THE CONFLICT OF LAWS

A Comparative Study

Ernst Rabel

•

THE CONFLICT OF LAWS

A Comparative Study

by

ERNST RABEL

Research Associate, University of Michigan Law School.
Sometime Professor of Law, University of Berlin, and
Director of the Institut der Kaiser Wilhelm
Gesellschaft für ausländisches und
internationales Privatrecht,
Berlin

Foreword

by

WILLIAM DRAPER LEWIS

DIRECTOR, THE AMERICAN LAW INSTITUTE

and

HESSEL E. YNTEMA

VOLUME ONE

Introduction: Family Law

Ann Arbor

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To my Wife

Foreword

I

THOSE who prior to World War II knew the chief legal personalities of Europe recognized the outstanding position held by Ernst Rabel, the author of the present treatise.

Born in 1874 in Austria, as a young man he studied law in his own country, in Germany, and in France. His university career has been most distinguished; he taught Roman and modern civil law in Switzerland and Germany, the many invitations he received leading to celebrated professorates, notably at Munich and ultimately at Berlin, where he occupied an influential position. His contributions to comparative legal history have been noteworthy; he first introduced the comparative study of Egyptian papyri with the medieval documents; he is a leader in the efforts, through the modern search for interpolations, to reconstruct the original Roman private law; his services as editor of various research publications in the field of legal history are well known. These broad interests were complemented by extensive comparative work on the modern Swiss, French, and German laws, later including the Common Law as well; his contributions in the preparation of international drafts of unified law, especially that on sales of goods, are widely recognized.

In Rabel, outstanding legal scholarship has been enriched by wide and unusual practical experience. He practiced law in Vienna and served as judge in the appellate courts of Basle and Munich. Shortly after the First World War, he became a member of the German-Italian arbitral tribunal. As a judge of the Court of International Justice (World Court) at the Hague, between 1925 and 1928, he took part in German and

Polish suits. He was president of the International Association of Comparative Law and a member of the Council and Executive Committee of the Institute for Unification of private Law in Rome. He received diverse honors in Italy, Greece, Poland, Spain, and Norway.

The central interests and achievements of the author have been in the development of comparative legal research. In the course of the First World War, he recognized the danger of a narrow legal nationalism and in 1916 founded and became Director of the Institute of Comparative Law in Munich, the world's first research institute for comparative law. In 1926, being appointed Director of the Kaiser Wilhelm Institute of Foreign and International Private Law in Berlin, he was entrusted with the task of organizing and conducting a much larger enterprise. This Institute, parallel to the Institute of Foreign Public Law and the Law of Nations, directed by the late Viktor Bruns, was devoted to research as well as to the giving of practical information and advice to the Foreign Office in Germany, legislative authorities, courts, lawyers, and business firms. Under Rabel's guidance, the Institute trained a staff of experts in the various legal systems of the world, some of whom are now in this country as law teachers or members of the legal profession, and, in conjunction with the sister organization, established the most comprehensive law library in Europe. The opinions delivered by the Institute under Professor Rabel's responsibility in matters of legislation, conflict of laws, international trade and international law, numbered about a thousand. The Institute exercised a profound influence in the legal thought and methods not only of Germany but also of those numerous other countries whose scholars availed themselves of its facilities.

After the completion of the Restatement of the Law of Conflict of Laws in 1934, the American Law Institute had under consideration a plan to supplement the Restatement by a

parallel work presenting to the American public the rules, principles, and doctrines of the leading foreign countries. But, until in 1937 the Nazi insanity removed from the directorship of the world's then principal organization devoted to the study of comparative law the director whose foresight and leadership conceived and conducted it, it had seemed all but impossible to find the right man for a task requiring so wide and mature a background of learning and experience. The opportunity thus offered to bring Doctor Rabel to this country to do much to break down our isolationist legal attitudes was unique. Doctor Rabel knows the private law systems of German and Latin-American countries. He knows much of the common law of the English-speaking peoples. Furthermore, he has not only the law professor's knowledge of legal theory, but the practical knowledge of the similarities and differences in the application of the legal principles of different systems to the solution of concrete legal problems.

Accordingly, in the spring of 1939, the American Law Institute took steps to bring Dr. Rabel to the United States with the guarantee of two years' employment. He arrived in this country in September, 1939, and at once began work preparatory to the preparation of this treatise, of which the first volume is now published. In the spring of 1942, his arrangement with the Institute having been fulfilled, the Law School of the University of Michigan gave him a position, which has now enabled him to complete the first of the volumes contemplated. His work in Michigan has been done under the most fortunate surroundings, as he has had the active advice and assistance from the point of view of a leading American specialist in international law, Professor Hessel E. Yntema.

The present treatise is the confirmation of Doctor Rabel's life work. Its primary purpose is to make a comparison of the significant legal systems of conflict of laws with reference to the specific problems arising in each topic. **The first volume,**

besides containing a most interesting and comprehensive introduction dealing with the literature, theories, and sources of the subject, is devoted to a study of the problems of what may be described as family relations, such as the personal law of individuals, marriage, divorce and annulment, and parental relations. It is a field presenting a variety of interesting and difficult conflicts problems. The second volume now well under way will deal principally with Foreign Corporations, Torts, and the General Problems of Contracts. It is hoped that there may be further volumes, covering the other legal topics treated in the American Law Institute's Restatement of the Law of Conflict of Laws.

In the course of its preparation and completion, the plan of the work has undergone substantial change.

The original plan was that of a work which, in arrangement, should exactly parallel the sections of the Restatement of Conflict of Laws. This plan has turned out to be impracticable. The differences between the European and American systems are too great to allow such minute comparison, section by section. The major subdivisions, however, present sufficient analogy to those of the Restatement to draw attention to the significant distinctions and similarities. Comparison between the foreign and American law has been emphasized throughout. The book does not simply constitute a presentation of foreign law, but a painstaking and comprehensive comparison of the solutions accorded to the particular problems of family law, both here and abroad. It is this feature that gives the work its special value and attractiveness.

The author conceives that comparison of laws requires study in the legal systems compared of the solutions reached on particular practical problems rather than the review of general theories. In thus emphasizing the comparative solutions of concrete problems, he is in accord with our common law habit of thought. Consistently carried out in the present treatise,

it greatly increases the value of the work in the English-speaking countries. The method does not ignore the necessary consideration of theories but obviously gives them less significance than is usually found in most European literature.

The work offers not only comprehensive assistance to the practicing lawyer or the judge who is concerned to know the answers in other countries to a conflict of laws problem, but will also furnish the English-speaking reader with foreign law concepts of the rules of conflicts of laws and their application in a form easily comprehended by those whose legal training is largely confined to our common law and statutes. In all the topics treated, the author enables us to appreciate the "other fellow's" point of view and compare its practical results with our own. This is not an insignificant service to a people just awakening from a self-centered legal sleep to an appreciation of the fact that we must hereafter go forward in a world which is increasingly one.

WILLIAM DRAPER LEWIS, *Director*
The American Law Institute

II

IT is appropriate to add a few remarks from the viewpoint of the University of Michigan. The foregoing statement by the director of the American Law Institute outlines the distinguished career of the author of the present work and indicates the circumstances under which he was invited by the Institute to undertake a comparative survey of the existing systems of conflicts law. As therefrom appears, while the inspiration to bring to this country an internationally recognized jurist with unique qualifications for the task—an extraordinary opportunity afforded only by the malign policy that has betrayed Germany and crucified millions in this generation—is to be credited to the Institute and more particularly to the generous wisdom of the director, the studies reflected in the

present volume have been substantially accomplished at Ann Arbor, in large part with the aid of funds and further assistance provided by the University of Michigan.

This co-operation, illustrating an appropriate function, as once suggested by the writer, for a nondenominational Institute in the world of academic rivalries, deserves a word of commendation. On the part of the University, it has been motivated not only by the liberal disposition of the Faculty of Law to promote worth-while research and their long-standing interest in comparative legal studies, but more especially by the significance of the enterprise. This is no mere *tabula ex naufragio*, thus rescued from the maelstrom in which contemporary European culture is engulfed. The survey undertaken is essential at the present time for the proper development of a branch of law of special interest for interstate and international trade, arising, as Story states, "from the conflict of the laws of different nations, in their actual application to modern commerce and intercourse." More generally, it exemplifies a fundamental mode of legal investigation, which each day becomes more nearly indispensable in the modern world.

The latter consideration, the need in these times for comparative legal research, does not call for extensive comment. The present conflict, multiplying contacts among the most distant peoples and through untold suffering and sacrifice uniting them to vindicate the common values of humanity, like the Napoleonic wars and the War of 1914, again emphasizes that no one is unconditionally immune from influences operative within the effective orbit of international intercourse. In a universe progressively interrelated by the miracles of modern communication, therefore, it is neither prudent nor even longer possible for any nation to pursue a policy of self-sufficient isolation. In such a universe, the notion that the corresponding legal order is compartmentalized exclusively within political frontiers is inadequate.

For legal science, so pervasively indoctrinated these hundred years by the preconceptions of sovereignty and nationalism, this spells the necessity of comparative reorientation, of ampler realization that justice both comprehends and transcends local interests. If the price of peace and liberty is constant vigilance in an integrated world, it is expedient to know what transpires abroad as well as at home. While legal science in each country will and should continue to cultivate first its peculiar institutions and traditions, these can no longer be accepted as the horizon of legal knowledge. The practical, specialized study of indigenous techniques, legislative, judicial, and administrative, must be complemented by scientific comparison with other legal systems—to ascertain their manifold bearings on domestic interests; to prepare the reforms that may be desired from time to time to bring the municipal laws into harmony with advancing conceptions of justice and the requirements of the international community; to share in efforts to provide appropriate uniform legislation for the commerce of the world; in fine, to establish a more objective scientific basis for the consideration of legal problems. To attain these ends, indeed even to appreciate the special genius of each legal system, the comparative method, necessarily supposing intensive historical and functional investigation of particular institutions, is indicated. Without this perspective, as Ihering pointed out long ago, there is no legal science worthy of the name. Blind without history, jurisprudence without comparative understanding can scarcely rise above the level of provincial casuistry and empirical craft.

Obviously, such understanding of the existing legal systems is most immediately needed in those branches of law that are concerned with international relations. Of these, the law of conflict of laws, devoted to the principles governing assumption of jurisdiction and resort to the proper law in the solution of private disputes of an international complexion, is in a parlous state, permitted presumably by the fact that it is

almost wholly administered in the ordinary courts in the positivistic atmosphere of municipal law. For, in this subject matter concerned with determining the application of the diverse legal provisions that may be involved in any such dispute, in consonance with, or at least without violating, common standards of justice, emphasis is rampant upon territorialism and nationality, upon the dominant pretensions of *lex fori* or *ordre public*, in other words, upon ideas that obscure, limit, or frustrate the very purpose in view.

This, it is worth recalling, was not always the emphasis. More than a hundred years ago, Story founded the modern law of conflict of laws on a broad, comparative basis, that looked, despite uncertainty and diversity in the then existing doctrines, "towards the establishment of a general system of international jurisprudence, which shall elevate the policy, subserve the interests, and promote the common convenience of all nations." Fifteen years after Story penned these words, in the preface to the eighth volume of the monumental *System des heutigen Römischen Rechts*, Savigny voiced two interesting prognostications in like vein. Adverting to the variety of opinions among both writers and courts respecting conflicts of laws, he nevertheless conceived that, from the exceptional and active common concern in the problems of this field of law, there would develop a universal, existent community of legal understanding and legal life. The further suggestion that the principle of nationality, then coming into prominence, would not make itself felt in a subject, the nature of which involves the resolution of conflicts of national laws within a recognized community of the various nations, equally reflects Savigny's international point of view.

How soon and how far these anticipations were to be disappointed is writ at large in the illuminating introduction that forms Part One of the present volume.

Aetas parentum, peior avis, tulit
Nos nequiores, mox daturos
Progeniem vitiosiore.

But two years after Savigny wrote, the doctrine of nationality, which in its exaggeration has so much contributed to international disorder during the past century, was proclaimed by Mancini as the fundamental principle of the law of nations and shortly became the distinctive basis of legislation in Continental Europe. Consequently, to borrow the author's expression, the international community, as contemplated by Story and Savigny, disintegrated. Story's broad understanding of the conflicts of law doctrines current in his time eventually shrank in the United States to the dimensions of the introverted treatment of the subject by Wharton and later by Beale: in England, Westlake bridged the way to Dicey's Anglican positivism; on the Continent, Savigny and his international-minded successors were duly eclipsed by the intransigent, if despairing, nationalism of Bartin and Kahn.

Thus, by 1900, the dominant supposition was a caricature of the truism that international private law is not international but private law; absorbed in domestic legislation and precedents, the doctrine reflected the prevailing provincial dogmatisms of legal science generally. Apparently, justified recognition of the circumstance that, under existing conditions, national courts typically administer conflicts rules as a branch of municipal law, was thought to warrant indifference to their international *raison d'être*. Consequently, legal theory in this field in recent years, having lost sight of the underlying purpose to be had in view, has devoted itself with aprioristic methods to unreal issues and become something of a logical mystery. Essentially, it faces the problem of how to square in terms of national interest or tradition a circle of internationally superior needs.

In this country, the current isolationism of conflicts of law doctrine has been accentuated by certain contributing factors: first, by a quite natural preoccupation on the part of specialists in the subject with the relatively frequent internal conflicts of jurisdiction and law arising within the federal structure of the United States; and second, by the extensive influence of the theories expounded by Beale, including the belief that reference in this field to civil law authorities is not one that tends "to preserve the correctness and purity of the common law." It deserves repeating—even after almost twenty years—that this is a conceit, strange and for the United States inexpedient. Strange, since it disavows the considerable indebtedness of common law doctrines respecting conflicts of laws to the civil law; inexpedient, since a great commercial nation cannot afford to remain in ignorance, particularly in this subject matter, of the laws of foreign countries with which it trades. In consequence of these influences, despite the pioneer work of Lorenzen and more recent contributions by Kuhn, Nussbaum, and others, inadequate attention has been given in this country to the relations between the doctrines of conflicts law as here evolved and those of foreign countries other than England. It affords little consolation that the condition is paralleled elsewhere. But it does serve to explain why no systematic effort has been made hitherto to provide a comprehensive, critical comparison of the existing systems of private international law.

Had it not been for this background, the preparation of the Restatement of the Law of Conflict of Laws, initiated in 1923 and promulgated in 1934, might well have been the occasion for such a survey. This, however, was not to be—it was precluded by the prepossessions of the reporter, by the curious determination, deviating from the original plan, to restate "the law as it is," and still more effectually by unfamiliarity with comparable foreign doctrines on the part of those invited

to participate as advisers (except for a time Lorenzen). Hence, the failure in this monumental codification of the Common Law to take account of other systems was not merely an effect of, but has become a cause to perpetuate an inappropriate view of international private law, which no longer befits the United States. On this count alone and apart from other limitations duly noted by critics, we repeat, the Restatement needs to be restated. But the preceding observations will suggest that it is still more important to provide the indispensable basis for such revision, including the comparative information without which inbred doctrines remain unquestioned and their objective, scientific consideration in terms of international needs is excluded *a limine*.

To supply this need, as the author justly observes in the preface, is a large task. The requisite survey of the existing systems of conflicts law involves critical examination and comparison of the significant rules on specific problems with reference to their evolution and purposes, as exemplified in these systems, and in the light of the pertinent literature and jurisprudence for each country, preferably accompanied by corresponding suggestions for improvement. Moreover, as conflicts rules look to reciprocal recognition and understanding of the respective specific institutions of local law, it is necessary that any such survey should be made on the background, however succinctly adumbrated, of the historical development and contemporary nature, significance, and interrelations of these institutions, considered in the context of the legislations of which they form part. The present volume is a first and substantial contribution to this undertaking; in addition to a magistral review of the literature, sources, doctrinal development, and general theories of the subject, it provides a comparative conspectus of the rules applicable to conflicts in the extensive field of family law. It is more than an annotation to the Restatement of the Law of Conflict of Laws, as was at first

contemplated. It is the first comprehensive comparative legal study that has been published in English for many moons, certainly the first in any language to take adequate account of the laws of the Americas as well as of Europe. It is, in sum, a pioneer, intensive exploration of a substantial part of the labyrinth of the laws of conflicts from the indicated international point of view, a contribution not only essential for progress in this field but also of general interest as an exemplar of the comparative method in law.

In pursuance of its undertaking to support this enterprise, the University has made substantial provision to maintain and implement the author's individual researches, including, among other things, accommodations in the Legal Research Library, ministerial assistance as required from time to time, and editorial collaboration, especially in adapting the author's incisive expressions to the idiosyncrasies of English style, the independent verification of all citations, and the preparation of the various tables (except for the index, which was made up by the author). In arranging this assistance, the responsibility for which was cast upon the editor as a condition of the adoption of the undertaking for a time by the University, various obligations have been incurred, which deserve to be acknowledged:

To the University authorities, to the Faculty of Law and Dean Stason in particular, for their constant and generous support in the effective prosecution of the work. To all those who, as members of the research staff, were engaged in one way or another in preparing, editing, and seeing the manuscript through the press, an exacting task in which the comparative use of legal materials from many countries has presented an unusual variety of questions, for their indispensable, respective contributions, efficiently rendered. To Eldon R. James, Law Librarian, Library of Congress, and Arthur C. Pulling, Director of the Harvard Law Library, for the appreciated as-

sistance of their respective staffs, which has made it possible to verify all save perhaps a dozen of the limited number of references to works not available in the Legal Research Library. To Hobart R. Coffey, to whom the editor is indebted equally with the author for expert relief unstintingly given in the revision of the manuscript. And, not least, to the author himself for unfailing co-operation and courageous devotion to a complex task under disturbed conditions.

Yet this is to be added. However indispensable the assistance provided by the University has been for the prosecution of the work, the product is in substance exclusively the author's; he alone collected the materials, and the views expressed herein are his. It is fortunate that a jurist of the author's attainments and scholarly sagacity has addressed himself to the task, which, it is hoped, may be extended in additional volumes to other significant branches of conflicts law.

HESSEL E. YNTEMA

Preface

FULL application of comparative methods to the law of conflicts requires a working plan of some magnitude. We ought to take stock of the conflicts rules existing in the different countries of the world, state their similarities or dissimilarities, and investigate their purposes and effects. The solutions thus ascertained should moreover be subjected to an estimation of their usefulness, by the standards appropriate to their natural objective. Conflicts rules have to place private life and business relations upon the legal background suitable to satisfactory intercourse among states and nations. They are valuable to the extent that their practical functioning, rather than their legal appearance, serves this purpose.

To meet the challenge of this program with limited forces is a risky undertaking. Nevertheless it has to be attempted. The conditions of the law of conflicts are deplorable. It may be said, to the reader's and my own consolation, that the staggering provincialism apparent in the international family law presented in this volume is not equaled in other parts. But if conflicts problems have been cultivated by men of the highest erudition, idealism, and endeavor, they have also been the object of prejudice and dogmatism. Suggestions of almost all needed ideas may be found, but little agreement on a sound choice. The courts of this country dealing with a wealth of interstate cases have prevailingly shown sincere respect for foreign legislation and applied an accomplished method of comparative research. But this admirable attitude, which is the most outstanding model for the practice of private international law, suffers exceptions, and in the field of international relations throughout the world, despite enormous efforts, the simple truth that harmony presupposes mutual understanding

and tolerance, has not prevailed in conflicts law more than in foreign affairs.

All considered, the further we extend our comparative survey, the less doubt can subsist about the need for a total reconsideration of the international purpose and the undeveloped resources of this branch of law. The time has passed when we may rest satisfied to state a rule and to regret it. Not that the premature legislation or halfhearted treaty making, familiar to the last decades, should be advocated. What this book is intended to suggest is a patient and concerted world-wide discussion determined to relieve the present chaos. I am convinced that large results must not be deferred to a remote future. The legal profession has great power and deserves great confidence. If it decided to consider conflicts law as a matter of general interest and gave it its unbiased attention, much might be obtained that now seems Utopian. I am particularly hopeful of the lawyers in the United States.

According to the program, I have regarded my foremost task to be the collection and grouping of the significant rules, theories, critical views, and proposals, and the cases animated by them. This task is comprehensive and worth-while enough to dictate sacrifices. It has not been possible to spare the reader and myself tedious enumerations and many a mosaic of incoherent pieces, and I have had to renounce historical and theoretical developments. Neither is there space to describe at length the institutions of private law that are the subject matter of the conflicts rules. This compulsory limitation is the more regrettable, as common law lawyers have not been introduced to the concepts of civil law as European lawyers were informed of Anglo-American institutions during the period between the two wars.

I have also restricted my own critical appraisals, and I have doubted whether any recommendations for the future should be added. Yet, in view of the personal encouragement that I

have received from such scholars as Elliott E. Cheatham, Max Rheinstein, and Hessel E. Yntema, and recently in Ernest Lorenzen's great review of the last period of American conflicts law, it seems to be the writer's duty not entirely to conceal his impressions regarding the desirable path that the evolution may take. Theoretical conclusions of more general scope as well as specified proposals for elaborating the rules may be expected, when comparative research in this singular and disturbed field has become broader and bolder. I hope the survey itself will almost automatically arouse the wish for certain reforms.

Because of the war time, European rules and cases are stated, in principle, as they were in 1939 at the beginning of the war. This is a rather convenient date for a view back, while a new epoch is starting. More recent materials coming through have, of course, been registered.

The Legal Research Library of the University of Michigan in Ann Arbor has afforded me a hospitable haven and ample facilities for work. Its farsighted policy has enabled me, for the first time in a work of this kind, to include a substantial amount of Latin-American doctrine. My satisfaction in this regard is somewhat impaired by the fear that my efforts of analysis have not been entirely successful in regard to certain Latin-American formulations. As these countries possess outstanding scholars in this field who are the natural intermediaries between common law and civil law, it is to be hoped that they will participate in carrying on the work here begun and supply the details not yet mentioned in the literature but with which the courts must deal.

To the American Law Institute, the Dean and Faculty of the Law School, University of Michigan, and the Research Department of the W. W. Cook Foundation directed by Professor Lewis M. Simes, I owe deepest gratitude. Dean Emeritus William Draper Lewis, the eminent and be-

loved director of the American Law Institute, has rescued me from the cataclysm of Europe; he has been the original sponsor of this enterprise and has not ceased to manifest his friendly interest in it. Professor Hessel E. Yntema, since 1940, has fulfilled his task as editor with an unprecedented sacrifice of time and labor. He has generously provided me with informations and suggestions, constantly supervised during all these years the comprehensive ministerial aid furnished by the research staff of the Faculty, and devoted his command of English style to an extremely delicate and exacting revision of the language of my manuscript. Professor Hobart R. Coffey has liberally shared in this burden, and to him, as Law Librarian, as well as to his entire staff, who have been most kind, I am grateful. I feel cordially obligated also for the devoted services of Mrs. Lilly Melchior Roberts, who, with the assistance of Miss Dorothy Karl, has been especially helpful in checking the documentation, to Dr. Vladimir Gsovski, Chief of the Foreign Laws Section, Law Library of the Library of Congress, and to those whose contributions Mr. Yntema has deservedly acknowledged.

Finally, it is my privilege to thank publicly Professor Max Rheinstein of the University of Chicago, the most faithful of friends, for the help he has freely given to this book as well as to me and my family. I am happy to see him represent in this country our common scientific ideals.

ERNST RABEL

Ann Arbor, Michigan

March 5, 1945

NOTE: Chapter 11 was published in preliminary, condensed form in volume 28 of the *Iowa Law Review*, January 1943, as "Divorce of Foreigners—A Study in Comparative Law."

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List of Abbreviations

A.C.	Appeal Cases, English Law Reports.
AG.	Amtsgericht (Germany).
All. F.R.	All England Law Reports, Annotated.
Allg. BGB.	Allgemeines Bürgerliches Gesetzbuch (Austria).
A.L.R.	American Law Reports, Annotated.
Am. Dec.	American Decisions (Select Cases).
Am. J. Int. Law	American Journal of International Law.
Am. Rep.	American Reports.
Amtl. S.	Entscheidungen des k.k. Obersten Gerichtshofs in Zivil-und Justizverwaltungssachen veröf- fentlicht von diesem Gerichtshofe, Fortsetz- ung der von Nowak begründeten Sammlung (Austria).
Anales Jud.	Anales Judiciales de la Corte Suprema de Justicia (Peru).
Ann. Giur. Ital.	Annali di giurisprudenza.
Ann. Sächs. OLG.	Annalen des sächsischen Oberlandesgerichts.
Annuaire	Annuaire de l'Institut de droit international.
Annuario Dir.	Annuario di diritto comparato e di studi legis- lativi.
Comp.	
App. Cas.	Appeal Cases, English Law Reports, 1876- 1890.
App. Civ.	Apelação Civil (Brazil).
App. Div. (N.Y.)	New York Supreme Court, Appellate Division Reports.
Arch. Civ. Prax.	Archiv für die civilistische Praxis (Germany).
Arch. Jud.	Arquivo Judiciario (Brazil).
Ariz.	Arizona Reports.
Atl.	Atlantic Reporter (National Reporter System, United States).
Barn. & C.	Barnewall and Cresswell, English King's Bench Reports.
Bay.ObLGZ.	Sammlung von Entscheidungen des Bayer- ischen Obersten Landesgerichts in Zivil- sachen.

BBl.	Bundesblatt der Schweizerischen Eidgenossenschaft.
B.C.	British Columbia Reports.
Beav.	Beavan, English Rolls Court Reports.
Belg. Jud.	Belgiques judiciaire. Gazette des tribunaux belges et étrangers.
BGB.	Bürgerliches Gesetzbuch (Germany).
BGE.	Entscheidungen des Schweizerischen Bundesgerichtes, Amtliche Sammlung.
Bing. N.C.	Bingham, New Cases, English Common Pleas.
Bl.f.Zürch.Rspr.	Blätter für zürcherische Rechtsprechung.
Brit. Year Book Int. Law	British Year Book of International Law.
Brooklyn L. Rev.	Brooklyn Law Review.
Bull. Argent. de Droit Int. Privé	Bulletin Argentin de droit international privé.
Bull. Inst. Belge	Institut Belge de droit comparé, Bulletin trimestriel. (See also Revue Inst. Belge).
Bull. Inst. Int.	Bulletin de l'Institut juridique international. Leyde. Originally: Bulletin de l'Institut intermédiaire international.
Bull. Soc. d'Études Lég.	Bulletin de la Société d'études législatives (France).
Bull. Soc. Législ. Comp.	Bulletin de la Société de législation comparée (France).
B.U.L. Rev.	Boston University Law Review.
Bush (Ky.)	Bush, Kentucky Reports.
BW.	Burgerlijk Wetboek (the Netherlands).
Cal. App.	California Appeals Reports.
Cal. L. Rev.	California Law Review.
Cambr. L. J.	Cambridge Law Journal.
Can. Bar Rev.	Canadian Bar Review.
C.B.	Common Bench Reports, Court of Common Pleas.
C.C.	Código Civil, Civil Code, Code Civil.
C. Civ. Proc.	Code of Civil Procedure.
Ch. D.	Chancery Division, English Law Reports, 1876-1890.
Chi. Kent Rev.	Chicago Kent Review.

C.J.S.	Corpus Juris Secundum (United States).
Cl. and F.	Clark and Finnelly's Reports, House of Lord's Cases.
Clunet	Journal du droit international. Fondé par Clunet, continué par André-Prudhomme.
Col. L. Rev.	Columbia Law Review.
Colo.	Colorado Reports.
Conn.	Connecticut Reports.
Conn. B. J.	Connecticut Bar Journal.
Cornell L.Q.	Cornell Law Quarterly.
Cr. & St.	Craigie & Stewart, House of Lords Reports (Scotland).
Craig. & St.	Craigie, Stewart and Paton, Appeals Cases (Scotland).
Curt. Ecc.	Curteis, English Ecclesiastical Reports.
D.	Dalloz, Recueil périodique et critique de jurisprudence, de législation et de doctrine (France).
D. & C. (Pa.)	District and County Reports, Pennsylvania.
D.C.	District of Columbia.
Dem. Sur. (N.Y.)	Demarest's Surrogate Reports, New York.
D.H.	Dalloz, Recueil hebdomadaire de jurisprudence (France).
Disp. Prel.	Disposizioni Preliminari del Codice civile (Italy).
Dist. Haw.	District of Hawaii.
Distr. Fed.	Districto Federal (Brazil).
DJZ.	Deutsche Juristenzeitung.
D.L.R.	Dominion Law Reports (Canada).
Dt. Justiz	Deutsche Justiz. Amtliches Blatt der deutschen Rechtsflege.
Dt. Recht	Deutsches Recht. Zentralorgan des national-socialistischen Rechtswahrerbundes.
EG. BGB.	Einführungsgesetz zum Bürgerlichen Gesetzbuch (Germany).
Els. Lothr. J.Z.	Juristische Zeitschrift für Elsass-Lothringen.
Eng. Rep.	Moak, English Reports (American reprint).
Entsch. kgl. Ob. Trib.	Entscheidungen des königlichen geheimen Obertribunals, 1837-1879 (Prussia).
Esp.	Espinasse, English Nisi Prius Reports.

F.(2d)	Federal Reporter, Second Series (United States).
F.C.A.	Federal Code Annotated.
Fed.	Federal Reporter (United States).
Fed. Cas.	Federal Cases (United States).
Foro Ital.	Il Foro Italiano.
Foro Ital. Rep.	Il Foro Italiano, Repertorio.
F.Supp.	Federal Supplement (United States).
Gac. del foro	Gaceta del foro; jurisprudencia, legislación, doctrina (Argentina).
Gaz. Jur. S. Paulo	Gazeta Jurídica; revista mensal de legislação, doutrina e jurisprudencia do Estado de São Paulo.
Gaz. Pal.	Gazette du Palais (France).
Gaz. Trib.	Gazette des Tribunaux (France).
Gaz. Trib. Mixtes	Gazette des Tribunaux Mixtes d'Egypte.
Geller's Zentralblatt	Zentralblatt für die Juristische Praxis, begründet von Dr. L. Geller (Austria). (See also Zentralblatt).
Giur Comp. DIP.	Giurisprudenza comparata di diritto internazionale privato.
Giur. Comp. Dir. Civ.	Giurisprudenza comparata di diritto civile.
Giur. Ital.	Giurisprudenza italiana.
G.L.R.	Gazette Law Reports (New Zealand).
GIU.	Sammlung von zivilrechtlichen Entscheidungen des Obersten Gerichtshofes, begründet von Glaser und Unger (Austria).
GIU. NF.	<i>Idem</i> , Neue Folge (new series of the court reports cited above) (Austria).
Grant (Pa.)	Grant's Cases (Pennsylvania).
Gratt. (Va.)	Grattan's Virginia Reports.
Grotius	Grotius, Annuaire international.
Grotius Soc.	Transactions of the Grotius Society.
Gruchot's Beiträge	Beiträge zur Erläuterung des deutschen Rechts, begründet von Dr. J. A. Gruchot.
Grünhut's Z.	Zeitschrift für das Privat- und Öffentliche Recht der Gegenwart, herausgegeben von Dr. C. S. Grünhut (Austria).
Hag. Con.	Haggard, English Consistory Reports.

Hans.GZ.	Hanseatische Gerichtszeitung. (See also Hans. RGZ. and Hans. RZ.)
Hans.RGZ.	Hanseatische Rechts- und Gerichts-Zeitschrift.
Hans.RZ.	Hanseatische Rechts-Zeitschrift.
Harv. L. Rev.	Harvard Law Review.
How.	Howard, United States Supreme Court Reports.
H.R.	Hooge Raad (the Netherlands).
HRR.	Höchststrichterliche Rechtsprechung (Germany).
Humph.	Humphreys' Tennessee Reports.
Ia.	Iowa Reports.
Ill.	Illinois Reports.
Ill. L. Rev.	Illinois Law Review.
Ind. App.	Indiana Appellate Court Reports.
IPRspr.	Die Deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts. Beilage der Zeitschrift für ausländisches und internationales Privatrecht (Z.ausl.PR.).
J.A.	Revista de Jurisprudencia Argentina.
Jahrh.DR.	Jahrbuch des Deutschen Rechts.
Jahrh. FG.	Jahrbuch für Entscheidungen in Angelegenheiten der freiwilligen Gerichtsbarkeit und des Grundbuchrechts (Germany).
Jahrh. H.E.	Jahrbuch höchststrichterlicher Entscheidungen (Austria).
J.Bl.	Juristische Blätter (Austria).
J. d. Tr.	Journal des Tribunaux (Belgium).
Jherings Jahrb.	Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts (Germany).
Johns. Cas. (N.Y.)	Johnson's New York Cases.
Journ. Comp. Leg.	Journal of Comparative Legislation and International Law. Formerly Journal of Society of Comparative Legislation (England).
Jur. Comm. Brux.	Jurisprudence commerciale de Bruxelles.
Jurid. Rev.	Juridical Review (Scotland).
Jur. Liège	Jurisprudence de la cour d'appel de Liège.
JW.	Juristische Wochenschrift (Germany).
Kan.	Kansas Reports.

K.B.	English Law Reports, King's Bench.
Kentucky L. J.	Kentucky Law Journal.
Kg.	Kantongerecht (the Netherlands).
KG.	Kammergericht (Germany).
K. & J.	Kay & Johnson, English Vice-Chancellors' Reports.
Ky.	Kentucky Reports.
Ky. (B. Mon.)	B. Monroe's Kentucky Reports.
La.	Louisiana Reports.
La. Ann.	Louisiana Annual Reports.
La. L. Rev.	Louisiana Law Review.
Law and Cont. Probl.	Law and Contemporary Problems. School of Law. Duke University.
Law Q. Rev.	Law Quarterly Review (England).
L.C.J.	Lower Canada Jurist.
Leipz. Z.	Leipziger Zeitschrift für Deutsches Recht.
L.J. (Ch.)	Law Journal Reports, Chancery (England).
L.J. (P.C.)	Law Journal Reports, Privy Council (England).
L.J.P.D. & A.	Law Journal, New Series, Probate, Divorce and Admiralty (England).
L.R.A.	Lawyers' Reports, Annotated (United States).
L.R.C.C.R.	English Law Reports Crown Cases Reserved, 1866-1875.
L.R.I.Eq.	Law Reports, Irish Equity Series.
L.R.P. & D.	English Law Reports, Probate and Divorce.
L.T.R.	Law Times Reports (England).
MacArthur	MacArthur, District of Columbia Reports.
Man. R.	Manitoba Reports (Canada).
Mart. N.S. (La.)	Martin, Louisiana Reports, New Series. 1823-1830.
Mart. O.S. (La.)	Martin, Louisiana Reports. Old Series. 1811-1823.
Md.	Maryland Reports.
Mich. L. Rev.	Michigan Law Review.
Minn.	Minnesota Reports.
Minn. L. Rev.	Minnesota Law Review.
Miss. L.J.	Mississippi Law Journal.
Mo.	Missouri Reports.
Mo. App. Rep.	Missouri Appellate Reports.
Monitore	Monitore dei Tribunali.

Moore P.C.	Moore, English Privy Council Reports.
NAG.	Bundesgesetz betreffend die zivilrechtlichen Verhältnisse der Niedergelassenen und Aufenthalter (Switzerland).
N.C.	North Carolina Reports.
N.E.	Northeastern Reporter (National Reporter System, United States).
Neb.	Nebraska Reports.
Neb. L. Bull.	Nebraska Law Bulletin.
Neb. L. Rev.	Nebraska Law Review.
N.H.R.	New Hampshire Reports.
N.J.	Nederlandsche Jurisprudentie.
N.J.Eq.	New Jersey Equity Reports.
N.J.Misc.	New Jersey Miscellaneous Reports.
Nouv. Revue	Nouvelle Revue de droit international privé.
N.W.	Northwestern Reporter (National Reporter System, United States).
N.Y.	New York Court of Appeals Reports.
N.Y.Misc.	New York Miscellaneous Reports.
N.Y.St.Rep.	New York State Reporter.
N.Y.Supp.	New York Supplement Reports (National Reporter System, United States).
N.Y.U.L.Q. Rev.	New York University Law Quarterly Review.
N.Z.L.R.	New Zealand Law Reports.
OGH.	Oberster Gerichtshof (Austria).
Okla.	Oklahoma Reports.
O.L.R.	Ontario Law Reports (Canada).
O.R.	Ontario Reports (Canada).
O.W.N.	Ontario Weekly Notes (Canada).
P.	English Law Reports, Probate Division.
Pa.	Pennsylvania Reports.
Paige	Paige, New York Chancery Reports.
Pand. Pér.	Pandectes périodiques. Recueil de jurisprudence (Belgium).
Paraná Jud.	Paraná Judiciario, doutrina, jurisprudencia e legislação.
Pasicrisie	Pasicrisie Belge. Recueil général de la jurisprudence des cours et tribunaux de Belgique.
Pa.Super.Ct.	Pennsylvania Superior Court Reports.
P.D.	Probate Division, English Law Reports.

P.G.R.	Liechtensteinisches Zivilgesetzbuch, Personen- und Gesellschaftsrecht.
Pos. Mschr.	Juristische Monatsschrift für Posen, West- und Ostpreussen, und Pommern.
Praxis	Die Praxis des Bundesgerichts (Switzerland).
Proceedings Am. Law Inst.	Proceedings, American Law Institute.
Q.B.	Queen's Bench, English Law Reports.
Queb. K.B.	King's Bench Reports (Quebec, Canada).
Que.S.C.	Quebec Official Reports, Superior Court (Canada).
Rb.	Rechtbank (the Netherlands).
Rechtsk. Wkbl.	Rechtskundig Weekblad (Belgium).
Rec. Somm.	Recueil des sommaires de la jurisprudence française.
Recueil	Recueil des cours de l'Académie de droit international de la Haye.
Req.	Chambre des requêtes de la cour de cassation (France).
Rev. de Jur.	Revue de Jurisprudence (Quebec, Canada).
Rev. Der. Juris. Adm.	Revista de Derecho, Jurisprudencia y Administración (Uruguay).
Rev. dos Trib.	Revista dos Tribunaes (Brazil).
Rev. Inst. Belge	Revue de l'Institut de droit comparé.
Revista del Foro	La Revista del Foro; organo del Colegio de Abogados (Peru).
Revista de los Trib.	Revista de los Tribunales (Peru).
Revista Der. Jur. y Ciencias Soc.	Revista de Derecho, Jurisprudencia y Ciencias Sociales (Chile).
Revista Der. Priv.	Revista de Derecho Privado (Spain).
Revista Dir. Civ.	Revista de Direito Civil, Commercial e Criminal (Brazil).
Revista Gen. Legisl. y Jur.	Revista General de Legislación y Jurisprudencia (Spain).
Revista Jur.	Revista Jurídica. Doutrina-Jurisprudencia-Legislação (Brazil).
Revista Sup. Trib.	Revista do Supremo Tribunal (Brazil).
Rev. Jur. Bras.	Revista de Jurisprudencia Brasileira (Brazil).

Rev. Trim. D. Civ.	Revue trimestrielle de droit civil (France).
Revue	Revue de droit international privé. Fondée par A. Darras.
Revue Crit.	Revue critique de droit international.
Revue Dr. Int. (Bruxelles)	Revue de droit international et de législation comparée. Fondée par Rolin Jaquemyns, Asser et Westlake.
Revue Inst. Belge	Institut Belge de droit comparé, Revue trimestrielle (1924—). Originally: Revue de l'Institut de droit comparé (1908-1914). Suspended 1915-1921. 1922-1924: Institut Belge de droit comparé, Bulletin trimestriel (See Bull. Inst. Belge).
RG.	Reichsgericht (Germany).
RGBL.	Reichsgesetzblatt (Germany).
RGZ.	Entscheidungen des Reichsgerichts in Zivilsachen (Germany).
Rhein. Arch.	Rheinisches Archiv für Zivil- und Strafrecht.
Rheinische Z. f. Zivil- und Prozessrecht—	Rheinische Zeitschrift für Zivil- und Prozessrecht des In- und Auslandes.
Rivista	Rivista di diritto internazionale.
Rivista Dir. Int. di Napoli	Rivista di diritto internazionale e di legislazione comparata.
Rivista Dir. Priv.	Rivista di diritto privato.
Rivista Italiana	Rivista Italiana di diritto internazionale privato e processuale.
R.L.	Revue Légale (Quebec, Canada).
Rob. Ecc.	Robertson, English Ecclesiastical Reports.
Rob. (La.)	Robinson's Louisiana Reports.
ROLG.	Die Rechtsprechung der Oberlandesgerichte auf dem Gebiete des Zivilrechts (Germany).
Rv.	Wetboek van Burgerlijke Regtsvordering (the Netherlands).
RVerwBl.	Reichsverwaltungsblatt (Germany).
S.	Sirey, Recueil général des lois et des arrêts (France).
Sächs. Arch.	Sächsisches Archiv für Rechtsflege.

S.C.(H.L.)	Court of Session Cases, House of Lords (Scotland).
Schlesw.-Holst. Anz.	Schleswig-Holsteinischer Anzeiger.
Sc. L. T.	Scots Law Times.
S.C.R.	Supreme Court Reports (Canada).
S. Ct.	Supreme Court Reporter (National Reporter System, United States); Supreme Court; Suprema Corte.
Seman. Jud.	Semanario Judicial de la Federación. Sentencias dictadas por la Suprema Corte (Mexico).
Sem. Jud.	La Semaine judiciaire (Switzerland).
Seuff.Arch.	J.A. Seuffert's Archiv für Entscheidungen der obersten Gerichte in den deutschen Staaten.
SJZ.	Schweizerische Juristen Zeitung.
So.	Southern Reporter (National Reporter System, United States).
So. Cal. L. Rev.	Southern California Law Review.
SpR.	Spruchrepertorium des Obersten Gerichtshofes (Austria).
S.R.	Liechtensteinisches Zivilgesetzbuch, Sachenrecht.
StAZ.	Zeitschrift für Standesamtswesen (Germany).
St. R. & O.	Statutory Rules and Orders (Great Britain).
Striethorst	Archiv für Rechtsfälle die zur Entscheidung des königlichen Obertribunals gelangt sind, 1851-1880. Herausgegeben von Striethorst (Prussia).
Sup. Trib. Fed.	Supremo Tribunal Federal (Brazil).
S.W.	Southwestern Reporter (National Reporter System, United States).
Sw. & Tr.	Swabey & Tristram, English Probate and Divorce Reports.
SZ.	Sammlung der Entscheidungen des Österreichischen Obersten Gerichtshofes in Zivil- und Justizverwaltungssachen. Veröffentlicht von seinen Mitgliedern (Austria).
Tenn.	Tennessee Reports.
Tenn. (Baxt.)	Baxter's Tennessee Reports.

Terr. L.R.	North-West Territories Law Reports (Canada).
Tex.	Texas Reports.
Tex. L. Rev.	Texas Law Review.
T.L.R.	Times Law Reports (England).
Trib. Comm. Bruxelles	Tribunal de commerce de Bruxelles.
Trib. Supr.	Tribunal Supremo.
Tul. L. Rev.	Tulane Law Review.
U. f. R.	Ugeskrift for Retsvaesen (Denmark).
U.L.A.	Uniform Laws, Annotated (United States).
U. of Chi. L. Rev.	University of Chicago Law Review.
U. of Detroit L.J.	University of Detroit Law Journal.
U. of Pa. L. Rev.	University of Pennsylvania Law Review and American Law Register.
U.S.	United States Reports.
U.S.C.	Code of the Laws of the United States of America.
U.S. Dist. Ct. Haw.	United States District Court for Hawaii.
Va. (Grat.)	Grattan's Reports, Special Court of Appeals of Virginia.
Va. L. Rev.	Virginia Law Review.
V. L. R.	Victorian Law Reports (Australia).
Vt.	Vermont Reports.
W.	Weekblad van het Recht (the Netherlands).
Warn.Rspr.	Die Rechtsprechung des Reichsgerichts auf dem Gebiete des Zivilrechts, herausgegeben von O. Warneyer (Germany).
Wash. L. Rev.	Washington Law Review.
Wis.	Wisconsin Reports.
W.L.R.	Western Law Reporter (Canada).
W. Va. L. Q.	West Virginia Law Quarterly.
W.W.R.	Western Weekly Reports (Canada).
Yale L. J.	Yale Law Journal.
Z.ausl.PR.	Zeitschrift für ausländisches und internationales Privatrecht. Begründet von Ernst Rabel.
ZBJV.	Zeitschrift des Bernischen Juristenvereins (Switzerland).
Zentralblatt	Zentralblatt für die Juristische Praxis. Con- tinuation of Geller's Zentralblatt (Austria).

Z.f.Ostrecht	Zeitschrift für Ostrecht. (See also Z.osteurop. R.).
Z.int.R.	Niemeyer's Zeitschrift für internationales Recht.
Z.osteurop.R.	Zeitschrift für osteuropäisches Recht. (In 1927 merged with Ostrecht into Zeitschrift für Ostrecht. Continued since 1934 as Zeitschrift für osteuropäisches Recht. See also Z.f.Ostrecht).
Z. Rechtspflege Bayern	Zeitschrift für Rechtspflege in Bayern.
Z. Schweiz. R.	Zeitschrift für schweizerisches Recht.
Z. Ziv. Proz.	Zeitschrift für deutschen Zivilprozess.

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PART ONE
INTRODUCTION

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CHAPTER 1

Literature and Sources of Conflicts Law

I. SCOPE OF CONFLICTS LAW

IN the American literature, the law of conflicts includes both choice of law, which contemplates the determination of the particular state law applicable to specific cases typically within the sphere of private law, and jurisdiction of courts, regarded by some writers as an aspect of legislative jurisdiction. In following this pattern, we shall observe the limitations of private law more strictly than is usual and only to the extent necessary explore the implications of constitutional, administrative, procedural, criminal, and public law generally. Thus, the rules of judicial jurisdiction will be considered in connection with those matters which are governed in this country by the domestic or internal law of the jurisdiction (the *lex fori*) and consequently depend upon choice of court rather than on choice of law.

According to the French doctrine, "private international law" combines choice of law, the law of nationality, and the legal status of foreigners. This last subject, concerned with the rules granting or refusing foreigners equal treatment with nationals, in theory is thoroughly different from conflicts law conceived primarily as choice of law. It presupposes that the law applicable to aliens has been selected and found to be the internal law of the state. For this reason, it is not regarded in Germany as part of private international law.¹

In this country, likewise, rules relative to "foreign" individuals—aliens and non-residents—typically do not appear in the treatises on conflicts law. The explanation given is

¹ See 1 ZITELMANN 256; KAHN, 1 Abhandl. 263 ff.

that citizens and non-citizens are not differentiated ² in respect to private law; this seems to contemplate exclusively relations between the American sister states. Nevertheless, the rules concerning foreign corporations, pertaining for the most part to internal law and in fact presenting many special features in the United States and to some degree in Germany, are included in the usual orbit of conflicts discussion. This practical method will be followed, although the regulation of foreign corporations is different from choice of law and in general forms part of administrative law.

Similar considerations make it desirable to give some attention to substantive provisions concerned with property situated or contracts performed or acts done in another state, or that otherwise involve foreign elements. Such provisions often appear as purely internal rules, but they may include genuine conflicts rules. For instance, a rule stating that a money debt expressed in foreign currency may be paid, at the option of the debtor, in domestic currency at the exchange of a certain date, is substantive merely. But the principle, enunciated in certain American statutes and judicial decisions,³ that statutory formalities prescribed for insurance contracts apply only to contracts executed within the state, is not merely a rule of municipal law territorially limited; it contains two rules, the one substantive, imposing formalities, the other, a conflicts rule, however delicate the borderline may be.⁴ There are also scattered throughout the national legislations numerous provisions that are not intended or are unsuitable for appli-

² 1 BEALE 8. On the rules, see MOORE, 4 Digest of International Law (1906) ch. XIII.

³ Mutual Life Ins. Co. v. Cohen (1900) 179 U. S. 262; Johnson v. Mutual Life Ins. Co. (1901-1902) 180 Mass. 407, 62 N. E. 733 (on Mass. Stat. 1894, c. 522 § 73, now Mass. General Laws (1932) c. 175 § 131); New York Life Ins. Co. v. Long (1917) 177 Ky. 445, 197 S. W. 948 (on Ky. Stat. § 679, now Ky. Rev. Stats. (1942) § 299.130).

⁴ In fact, the provision cited in New York Life Ins. Co. v. Long (*supra* n. 3) has been characterized as a "spatially limited" internal rule by NUSSEBAUM, Principles 70.

cation by foreign courts, as for instance, the peculiar English provisions imposing upon certain persons the burden of support of indigents.⁵ All such internal regulations, with potential international significance, deserve systematic examination in connection with the laws of the particular countries. In the present survey, it will be possible only to make occasional reference to such problems. On the other hand, in view of their preponderant influence, internal rules embodying so-called stringent public policies, and hence superseding the operation of general conflicts rules, must be taken into account.

The observations in the present introduction are not intended to serve as a general analysis of conflicts law. Modern writers in this field have begun to develop a body of generalized theories,⁶ but most of the topics they deal with are beyond present purposes. Certain problems, such as the attitude of the courts in the different countries with regard to public policy or the methods of considering foreign law in lawsuits, involve positive formulations of law, which ought to be reported in a comparative survey and will be referred to in their appropriate connections. Other long-standing problems of deep scientific interest, such as the exact classification of conflicts law in the legal system, do not need more international discussion. Others, including the dubious role of the "preliminary question,"⁷ have not matured sufficiently to warrant general observations.

Finally, there are problems regarding the structure and application of conflicts rules that are of interest from the viewpoint of method and have attracted wide and vivid attention

⁵ See *infra* pp. 325, 611, n. 8, 622, n. 63.

⁶ A penetrating analysis has been made by MAURY in his Hague lecture, "Règles générales des conflits de lois," 57 *Recueil* 1936 III 325. Other lectures under the same title by AGO, 58 *Recueil* 1936 IV 247; DAVIES, an English author, 62 *Recueil* 1937 IV 427; and H. LEWALD, published separately, Basel, 1941, (an elegant theoretical study). See, moreover, I. HENRI HIJMAN, *Algemeene Problemen van Internationaal Privaatrecht* (1937).

⁷ See CORMACK, "Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws," 14 *So. Cal. L. Rev.* (1941) 221, 243.

during recent years. The purpose of this introduction is to summarize the writer's view on these questions. This view premises that each case should be considered on its merits; therefore it does not presuppose the determination of individual problems by general dogmas.

II. LITERATURE ⁸

I. The International Historical Background ⁹

In its generally accepted sense, the law of conflicts or private international law dates from the medieval school of the postglossators (also named legists or commentators), who in the late thirteenth century succeeded the glossators in the universities of northern Italy and southern France.¹⁰ Like

⁸ The titles of many of the works cited by authors' names in the following brief survey are to be found in the bibliographical list on page 661. The accompanying dates indicate the years in which the first considerable publications of the respective authors occurred.

⁹ On the *history* of conflicts law: *Outlines* in English: 3 BEALE 1880-1975; CHESHIRE 68; and RHEINSTEIN, "Comparative Law and Conflict of Laws in Germany," 2 U. of Chi. L. Rev. (1935) 232-269.

Standard works: CATELLANI, *Il diritto internazionale privato e i suoi recenti progressi*, 2 vols. (1895, 1902); LAINÉ, *Introduction au droit international privé*, 2 vols. (1888, 1892); NEUMEYER, *Die gemeinrechtliche Entwicklung des internationalen Privat- und Strafrechts bis Bartolus*, 2 vols. (1901, 1916); *idem*, "Zur Geschichte des internationalen Privatrechts in Frankreich und den Niederlanden," in 2 *Zeitschrift für Völkerrecht* (1920) 190; MEIJERS, *Bijdrage tot de geschiedenis van het internationaal priva- en strafrecht in Frankrijk en de Nederlanden*, (1914); *idem*, "Nieuwe bijdrage tot het ontstaan van het beginsel der realiteit," 3 *Tijdschrift voor Rechtsgeschiedenis* (1922) 61; *idem*, "L'histoire des principes fondamentaux du droit international privé à partir du Moyen-Age, spécialement dans l'Europe occidentale," 49 *Recueil* 1934 III 543; GUTZWILLER, "Le développement historique du droit international privé," 29 *Recueil* 1929 IV 287 (with full list of literature 395-397).

Historical summaries are given in almost every handbook; particularly recommendable are those by WEISS, 3 *Traité* 8-129, 130-149; GUTZWILLER, *Internationalprivatrecht* 1521-1534; ESPINOLA, 7 *Tratado* 115-313.

¹⁰ The last and most authoritative member of the school of glossators, ACCURSUS, instigated the query by his brief annotation (A. D. 1228) to the first Imperial decree of the Justinian Codex (C. J. 1, 1, 1), the *Constitutio "Cunctos populos"*. The postglossators developed the treatment of the conflict of statutes (i. e., those of the upper Italian cities) as glosses to this Constitution. The most outstanding postglossators were also the main authorities for conflicts law: BARTOLUS DE SAXOFERRATO (1314-1357) and BALDUS DE UBALDIS (1327-1400).

the Roman law into which it was artificially incorporated, this branch of law was regarded as universally binding. The territorial realm of the doctrines of the postglossators exceeded even the boundaries within which the canon and Roman laws were received as "written reason," representing the law of all Christendom. These doctrines, as accepted and transformed by eminent scholars in France ¹¹ and Holland ¹² during the sixteenth and seventeenth centuries, gained recognition in England and in the United States.

The law of conflicts thus became one field, in which the common and civil laws had a common doctrinal basis and which could be thought of as a truly international law. This conception of a world community was still prevalent when in 1834 the great American, Joseph Story, merged the Dutch doctrine with the Anglo-American cases. His treatise acquired authority in both hemispheres and contributed to the continuation, in renewed form, of an internationally-minded school on the European Continent. In particular, Germany's greatest jurist, Friedrich Carl von Savigny (1849) using Story's materials and rational method,¹³ established the fundamentals of modern conflicts law. It was significant that his treatment of this subject formed the last part of the celebrated *System of Modern Roman Law*; for him, there was no doubt about the suprapstate nature of the subject matter. This work of the leader of the historical school became the principal authority in all Europe and Latin America during most of the nineteenth century and is still highly regarded

¹¹ The most famous scholars were MOLINAEUS (CHARLES DUMOULIN) (1500-1566), and ARGENTRAEUS (BERTRAND D'ARGENTRÉ) (1519-1590). On these see also MEILI, "Argentraeus und Monilaeus und ihre Bedeutung im internationalen Privat- und Strafrecht," 5 Z.int.R. (1895) 363, 452, 554. For what is now Belgium, NICOLAUS BURGUNDUS (1586-1649), and for Holland, CHRISTIAAN RODENBURGH (1618-1668), may be mentioned.

¹² "Dutch school," main representatives: PAULUS VOET (1619-1677); ULRICUS HUBER (1636-1694); JOHANNES VOET (1617-1713). See LORENZEN, "Huber's De Conflictu Legum" in *Celebration Legal Essays* (in honor of John H. Wigmore, 1919) 199.

¹³ See SAVIGNY iv (tr. Guthrie 44); GUTZWILLER, 29 *Recueil* 1929 IV at 341.

in certain countries. The international conception of "international private law" was adopted by Foelix (1843) in France, a professed follower of Story, by the Belgian Laurent (1880), the Italian Fiore (1869),¹⁴ the Swiss Brocher (1871),¹⁵ and by almost all outstanding authors until approximately 1890.¹⁶ These authors wrote on conflicts law in a common atmosphere, among brethren of the same creed, envisaging its application in all countries. So did also the scholars who with the eminent German, Ludwig von Bar (1862),¹⁷ protested against being classified among the internationalists¹⁸ but who nevertheless thought that special studies, restricted to the positive laws of particular legal systems, unaided by general theory, narrow in perspective, are prone to choose improper premises or to misconceive the sphere of individual principles in the "organism" of international private law.¹⁹

In time, the international community disintegrated. The common law lawyers, segregated from the civil law background, instinctively receded from naïve cosmopolitan attitudes. Absorbed in the judicial decisions of their countries, they gave slight attention to developments elsewhere. In the civil law countries on the other hand, from the end of the eighteenth century, there appeared an increasing number of

¹⁴ PASQUALE FIORE, *Elementi di diritto internazionale privato* (Firenze, 1869).

¹⁵ CHARLES BROCHER, "Théorie du droit international privé," *Revue* 1871, 412, 540, *Revue* 1872, 189, *Revue* 1873, 137, 390.

¹⁶ NUSSBAUM, D. IPR. 11, and in an extensive paper, "The Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws," 42 *Col. L. Rev.* (1942) 189, 194, accounts for the prevalence of universalism or aprioristic thought from 1870 to 1930, on divers assumptions which the present writer does not share. See also GUTZWILLER, review of NUSSBAUM'S D. IPR., 8 *Z. ausl. PR.* (1934) 652, and see the list of "nationalists" by KAHN, 1 *Abhandl.* 3 n. 2 and 270 n. 29.

¹⁷ BAR, *Das internationale Privat- und Strafrecht* (Hannover, 1862).

¹⁸ BAR, "Neue Prinzipien und Methoden des internationalen Privatrechts,"

15 *Archiv des öffentlichen Rechts* (1900) 1 at 11, 45.

¹⁹ Preface to the second edition of BAR, 1 *Theorie und Praxis des internationalen Privatrechts* vii (tr. Gillespie viii).

national codifications of private law, which divided the European Continent into separate units, secluding them behind progressively higher barriers of national legislation. Relatively late, the impact of this process reached the conflicts law. The specialists in this branch of law, which seems predestined always to lag behind the currents of general jurisprudence, were tardily and rudely awakened by the discovery that the supposed international source of law did not exist.²⁰ Former universalist conceptions gave way to the knowledge that conflicts rules no less than other rules of law must have their roots in the soil of some state and that international rules in the proper sense flow only from international custom or treaties, and at that in a very thin stream. Thus, the long-established international community of conflicts studies was dissolved, and the national conflicts rules succumbed to the same spirit of isolationism that permeated other fields of law. Against this background, the meager achievements of the Hague Conventions of 1902 and 1905 appeared like a little island of blossoming internationalism.

Although the doctrine of "national" or "positive" origin of conflicts rules has been definitely established long since, a few ingenious thinkers have resented its dismal consequences. They have tried to revive universal rules by new ideas. With this in view, Pillet (1894)²¹ distinguished two classes of municipal law, viz., necessarily territorial general rules and "permanent" rules of extraterritorial application, the distinctive criterion being the "social purpose" of the rules.²² The German professor Zitelmann (1897), in a work full of suggestive ideas, conceived the possibility of creating a vast

²⁰ The scientific formulation of the "positivistic" approach was given by NIEMEYER, *Zur Methodik des internationalen Privatrechtes* (1894) 26.

²¹ PILLET, "Le droit international privé. Essai d'un système général de solution des conflits de lois," *Clunet* 1894, 417, 711, *Clunet* 1895, 241, 500, 929, *Clunet* 1896, 5.

²² Cf. GAUDEMET, "La théorie des conflits de lois dans l'oeuvre d'Antoine Pillet et la doctrine de Savigny," 1 *MÉLANGES PILLET* (1929) 89.

system of conflicts law upon the basis of the law of nations.²³ Belatedly, Frankenstein (1926) has spun a whole web of conflicts rules from the premise that the only "scientific" choice of law is primarily predicated upon the dominance of each state over its citizens and over things in its territory.²⁴ Such deductive systems have been commonly rejected.

A third movement was initiated by the Italian patriot, Mancini (1851).²⁵ His vigorous emphasis on the function of the nation produced a wave of emotional nationalism in the field of international law. When Mancini advised the drafting of the preliminary provisions of the Italian Civil Code of 1865, his postulates were transferred from international public law to conflicts law, as expressed in the principle that all persons should be governed by the law of the state whose citizens they are, which by an eventful transition of ideas became identified as the *national* law. This principle was adopted in all Central and Southern Europe, as well as in Brazil, Japan, and China. It was advocated by internationalists such as Laurent, André Weiss, and Bartin and appears in the German, Swedish, Polish, and many other legislations, clearly embodying the doctrine of positivism. No other doctrine has found more fervent adherents; none has more estranged the civil and common laws from each other.

These three schools, the aprioristic internationalists, the faithful expositors of fragmentary statutes and cases, the

²³ See GUTZWILLER, "Zitelmann's völkerrechtliche Theorie des Internationalprivatrechts," in Festgabe, 16 Archiv für Rechts- und Wirtschaftsphilosophie (1923) 468. A pious apology for Zitelmann's doctrine was written by BETTI, "Ernst Zitelmann e il problema del diritto internazionale privato," 17 Rivista (1925) 33, continued at 188.

²⁴ See the criticism by YNTEMA, Book Review, 40 Harv. L. Rev. (1927) 794; YNTEMA, Book Review, 42 Harv. L. Rev. (1929) 1092; LORENZEN, Book Review, 36 Yale L. J. (1927) 1030; LORENZEN, Book Review, 39 Yale L. J. (1930) 921; NEUMEYER, 3 Zausl.PR. (1929) 260; LEWALD, 2 Blätter f. IPR. (1927) 65; GUTZWILLER 1534; PACCHIONI 65; complete bibliography by GHIRON, 27 Rivista (1935) 125.

²⁵ "Della nazionalità come fondamento del diritto delle genti," inaugural address at the University of Turin.

propagandists of nationality as the standard of personal rights and duties, have had their time, and their time is over. A new epoch began about 1925. Previously, a few far-seeing scholars, Bar,²⁶ Kahn, Anzilotti, Niemeyer,²⁷ perceived that conflicts rules, though derived from a national source like other ordinary legal rules, have special functions and purposes requiring a method of international scope. Kahn, one of the most acute advocates of positivism, went so far as to postulate that both the international and the positivistic methods should be integrated through the comparative method and so superseded.²⁸

2. Modern Treatises

The following are the most significant works on conflict of laws of the nineteenth century and of the first quarter of the twentieth.

*England.*²⁹ The English courts were slow and reluctant to adjust themselves to the application of foreign law. Until recently, the literature was sparse.³⁰ In the nineteenth century Westlake alone wrote a treatise (1858) purporting to establish a system of conflicts. With this exception, the English writers refrained from criticism of the courts and left the law in the incoherent state represented in the cases. The often re-edited treatise of Dicey (1896) illustrates this descriptive method with its finest and its less desirable characteristics.

²⁶ 15 Archiv des öffentlichen Rechts (1900) 1, *supra* n. 18.

²⁷ KAHN, 1 Abhandl. 311, 315, 322, 326; ANZILOTTI, Il diritto internazionale nei giudizi interni (1905) 151 (see his earlier Studi critici di diritto internazionale privato (1898) 130 V), declared the conflicts rules national in form (source) and supranational in substance: this formula served as a basis of a peculiar theory which was followed by numerous Italian and French writers. Cf. AGO, Teoria 83 n. 2; MAURY, 57 Recueil 1936 III at 366; NIEMEYER, Das IPR. des BGB. 50.

²⁸ 1 Abhandl. 502 (written in 1900).

²⁹ Treatises by WESTLAKE, FOOTE, DICEY, HIBBERT, BURGE.

³⁰ See HARRISON, On Jurisprudence and the Conflict of Laws (1878, 1879, reprinted and annotated by LEFROY, 1919) 121. The first writers were JABEZ HENRY (1823) and BURGE (1838) according to HARRISON, Clunet 1880, 429; see also GUTZWILLER, 29 Recueil 1929 IV at 338.

The intercourse within the parts of the British commonwealth occasioned a certain interest in their different legislations. The early work of Burge on colonial law, including private international law, is being published in a revised, monumental, though unsystematic, edition.

*United States.*³¹ Succeeding Chancellor Kent's influential Commentaries (1826-1830),³² Joseph Story's work (1834) was of immense importance.³³ Admittedly, Story, who employed an eclectic method to choose among the various doctrines of his predecessors, the statutists, in substantial measure preserved their conceptions and solutions, but his touch modernized the wealth of casuistic practice that lay immersed in the literature of half a millenium. These materials he enriched with the English and American case law, and he was the first to master the huge subject with the wisdom of a great judge.

Thereafter, only two notable treatises appeared during many decades: Wharton's valuable and richly documented two volumes (1872), which recognized legislative action, instead of "moral duty" or "comity" as assumed by the Dutch writers and Story, as the source of conflicts rules; and the instructive compendium of Minor (1901), providing a doctrinal analysis of the cases as of the turn of the century.

A radical change came with the extraordinary achievements of Beale. In an admirable effort, he collected and sifted the case materials, which had piled up to a gigantic height, and,

³¹ KUHN, "La conception du droit international privé d'après la doctrine et la pratique aux États-Unis," 21 *Recueil* 1928 I 193.

Treatises: KENT, STORY, WHARTON, MINOR, GOODRICH.

Casebooks: BEALE, LORENZEN, HARPER and TAINOR, and by CHEATHAM, DOWLING, GOODRICH and GRISWOLD.

For lists of Anglo-American articles in the field of conflict of laws see CHEATHAM, DOWLING, GOODRICH and GRISWOLD, *Cases and Other Materials on Conflict of Laws* (1941) p. xlix, and LORENZEN, *Cases and Materials on the Conflict of Laws* (1937) p. xxi.

³² J. KENT, *Commentaries on American Law* (4 vols., ed. 1, New York, 1826-1830).

³³ See the praise by HARRISON, *supra* n. 30, at 119; 3 BEALE 1912.

after many special studies, undertook to reconstruct the American conflicts law into a unified system. His life work culminated in the *Restatement of the Law of Conflicts of Laws*,³⁴ inspired and primarily prepared by Beale, which has been promulgated (1934) by the American Law Institute, and in his *Treatise* (1935) which presents an authoritative commentary on the Restatement. One might compare the historic role of Beale's work in American conflicts law with that of the *Glossa Magistralis* of Accursius in the late Middle Ages. More than a century of Anglo-American case law was condensed under the leadership of a strong methodical mind. Values buried in the vast mass of decisions were brought to light and preserved for the future. In various subjects, court practice gained increased certainty, and theoretical thinking received decisive impulses; indeed, a new literature grew up. Goodrich, footing on Beale's theories but adding his own experience and sense for social policy, has written an excellent leading textbook.

Most American writers, however, though grateful for Beale's work, have turned against his doctrines. Beale was the last eminent advocate of the theory of territorialism that dominated the Dutch statistists. In its proper sense, the territorial nature of law predicates exclusive control by domestic law in each jurisdiction. This theory, however enfeebled by gradual concessions, is the exact antipode of private international law. This foundation of Beale's system was entirely destroyed by Lorenzen and Cook. The revived theory of vested rights by which Beale tried to maintain the doomed principle of territorialism was successfully attacked by Yntema, Cook, Lorenzen, Heilmann, and, on the Continent, by

³⁴ Abroad the Restatement was much noticed. See particularly HARPER, "Das 'Restatement of Conflict of Laws' des Amerikanischen 'Law Institute,'" 9 Z. ausl.PR. (1935) 821; MENDELSSOHN-BARTHOLDY, "The American Restatement," 21 Grotius Soc. 1935, 161; BARBEY, "L'oeuvre du Professeur Beale, de Harvard," Revue Crit. 1936, 86; NOLDE, "La codification du droit international privé aux États-Unis d'Amérique," Nouv. Revue 1936, 7.

Arminjon, Wigny, and others who simultaneously were particularly interested in combatting Pillet's kindred philosophy.³⁵ In addition, many particular points peculiar to the Restatement were the object of special critical studies. Thus, a new school has arisen, paralleling German efforts and promising further improvements.

*France and Belgium.*³⁶ The French masters of statist doctrine in the sixteenth century, d'Argentré and Dumoulin, and their many disciples in the two succeeding centuries³⁷ established a tradition that has continued until recently, just as the method of the postglossators in private law survived after the Napoleonic codes for a considerable period into the nineteenth century. This heritage, it would seem, included various traits—a certain conservatism in method, an inclination toward *a priori* assumptions, an alert interest in the problems presented in the courts, and comprehensive elaboration of the arguments involved in particular issues. Concurrently, the influence of Story and Savigny added new elements. A large number of talented authors assured the French literature a leading role, more completely justified in the second half of the nineteenth century and the first quarter of the twentieth than in the sixteenth or the eighteenth. Richly documented treatises by Laurent, Boucher, and Rolin were followed by the original systems of Vareilles-Sommières (1897), Bartin (*Études* 1897, 1899), and Pillet (*Principes* 1903, *Traité* 1923–1924). André Weiss (*Traité* 1892–1905) consolidated theory and practice in a comprehensive work, in which the nationality principle was brought to its climax. Numerous periodicals, headed by the *Journal de droit inter-*

³⁵ See *infra* pp. 23ff.

³⁶ Treatises of FOELIX, BOUCHER, VAREILLES-SOMMIÈRES, BARTIN, PILLET, WEISS, AUDINET, DESPAGNET, VALÉRY, SURVILLE, NIBOYET, LEREBOURS-PIGEONNIÈRE, ARMINJON (the last three now leading).

Belgium: LAURENT, ROLIN, POULLET (the last now leading).

³⁷ Most famous: FROLAND (published 1729, died 1746); BOULLENOIS (1680–1762); BOUHIER (1673–1746).

national of Clunet (1874-) and the *Revue de droit international* published by Darras (1905-), in addition to the *Dictionnaire de droit international privé* published by Vincent and Pénaud in 1888,³⁸ collected so many French and foreign decisions that, as early as 1905, H. Donnedieu de Vabres was able to describe the "evolution"³⁹ of the French practice in a monograph.

Bartin, Niboyet, Pillet's outstanding disciple, and Arminjon, a critically-minded former judge at the Egyptian Mixed Tribunals, continued this brilliant literature. These and other modern writers have constantly studied the judicial decisions and meditated on general problems such as public policy, formalities of legal acts, capacity, matrimonial property law, etc., while the courts have been interested in the theoretical as well as the practical aspects of the cases. The *Revue* has been continued in two rival periodicals edited, respectively, by Niboyet and La Pradelle, who formerly had jointly published the useful *Répertoire de droit international privé* in ten volumes.

The French manner of conceiving conflicts problems contains a two-fold weakness. The tradition deriving from d'Argentré, the French predecessor of Ulricus Huber, has laid an extraordinary emphasis upon the national interest. The following chapters dealing with the law of persons will show the devastating effect of innumerable open or concealed considerations of French "*ordre public*." For decades, writers sharply criticized the tendency of the courts to apply French law despite the ordinary principles of conflicts law, but, more recently, the *Traité* of Niboyet (1938) and the *Précis* of Lerebours-Pigeonnière (1928), undoubtedly the two leading French works, testify to a violent struggle between the

³⁸ R. VINCENT et E. PÉNAUD, *Dictionnaire de droit international privé* (Paris, 1888-1889).

³⁹ H. DONNEDIEU DE VABRES, *L'évolution de la jurisprudence française en matière de conflits des lois* (Paris, 1905).

nationality principle, expounded by André Weiss and his followers, and the fears and wishes of an apprehensive, ambitious territorialism, represented by a movement, reflecting the interests of an immigration country, that accentuates the peculiarities of French legislation. On the other hand, the individualism and independent judgment characterizing French judges and jurists, which produce an abundance of ideas within the limits of their methods, have resulted in a curious instability. In many topics of conflicts law, every conceivable opinion has its advocate. Neither writers nor courts feel bound by precedent. Consequently, French conflicts law as a whole presents a great wealth of inspiring conceptions, attended by a degree of uncertainty, if not chaos, that is scarcely compatible with the very purpose of this branch of law.

*Italy.*⁴⁰ Dionisio Anzilotti, eminent scholar of international public law, has devoted a part of his work to conflicts law and is to be regarded in both fields as the founder of an important school, which also includes Cavaglieri, Salvioli,⁴¹ and Udina. At a relatively early date, Diena published monographs on international commercial law (1900-1905) and the principles of private international law (1908-1910). In the 1930's, a succinct manual by Pacchioni (1930) and a perspicacious treatise by Fedozzi (1935), accompanied under his leadership by works of other writers on ecclesiastical, commercial and procedural conflicts, continued the Italian tradition. This tradition has been characterized by refined abstract theory, nourished by intimate knowledge of the French and German developments. While Anzilotti possessed a high sense of practicality, his successors have more and more yielded to the scholastic passion for formulae and dialectic argument.

⁴⁰ Treatises: FIORE, DIENA, GABBA, ANZILOTTI, CAVAGLIERI, UDINA, PACCHIONI, FEDOZZI, AGO, GEMMA, BOSCO, SCERNI.

⁴¹ G. SALVIOLI, *Storia del diritto italiano* (Torino, 1930).

Italian writers have been the last in Europe to consider court decisions. Fortunately, the light has recently been seen by the younger authors noted below.

The distinguished periodical founded by Anzilotti in 1906, the *Rivista di diritto internazionale*, includes important contributions to conflicts law, but only few selected decisions. Fedozzi founded a promising *Rivista italiana di diritto internazionale privato e processuale* (1931-1932), which was ended by his lamented death.

Other Latin countries. Numerous meritorious compendiums related to the French, Belgian and Italian literature on conflicts law have been published in Argentina (Zeballos, Calandrelli, Alcorta, Romero del Prado and, now leading, Vico), Brazil (Clovis Bevilacqua, Rodrigo Octavio, Pontes de Miranda, Eduardo Espinola and his son), Colombia (Restrepo-Hernández), Cuba (De Bustamante), Guatemala (Matos), Rumania (Antonescu), and Spain (Lasala Llanas, Trías de Bes).

The Netherlands. During this period, three outstanding works appeared, namely, those of Asser (1880), Jitta (1916), and Koster (1917).

Germany. In Germany there was a less known statist school from the sixteenth to the nineteenth century,⁴² when Waechter destroyed the entire doctrine (1842).⁴³ The modern development was brilliantly inaugurated by Savigny in 1849.⁴⁴ His theories were accepted both by Roman law scholars such as Seuffert, Keller, Holzschuher, Unger,

⁴² Thorough survey and criticism by WAECHTER, 24 Arch. Civ. Prax. (1841) 230 ff., and BAR § 19 ff.; see for the names also GUTZWILLER, 29 Recueil 1929 IV 329-331.

⁴³ WAECHTER's series of articles entitled "Ueber die Collision der Privatrechtsgesetze verschiedener Staaten," appeared in 24 Arch. Civ. Prax. (1841) 230 ff., 25 Arch. Civ. Prax. (1842) 1 ff., 161 ff., 361 ff.

⁴⁴ On SAVIGNY's work and effect: GUTZWILLER, Der Einfluss Savignys auf die Entwicklung des Internationalprivatrechts (1923), and same, in 29 Recueil 1929 IV at 353.

Windscheid, and Regelsberger and by students of German legal history like Walter, Gerber, Beseler, Roth, and Gierke.⁴⁵ Although an admirer of Savigny, Bar (1862), in his works, especially in the second edition of his treatise, entitled *Theory and Practice* (1889), took a distinct position, joining theoretical conception with profound study of civil and common law cases and presenting, for the first time since Story, a comprehensive comparative law of conflicts. Zitelmann's highly refined system and the penetrating analytical studies of Franz Kahn, as well as the historical works of Neumeyer, characterized the high level of scientific treatment in Germany at the turn of the century. Leading decisions were reproduced in the *Zeitschrift für Internationales Recht* of Böhm, later Niemeyer. Gebhard's drafts of the Law of 1896⁴⁶ and the commentaries thereon by Niemeyer, Habicht and Niedner are noteworthy.

Nevertheless, this literature was sporadic and heterogeneous, without definite working plan and method. The courts struggled for principles; their decisions, although by no means negligible, were not conveniently digested and, consequently, were for the most part unknown. The German courts, otherwise meticulous, often ignored the conflicts problems hidden in cases.

In striking contrast to the richness of the French literature, for many years there was no textbook on conflicts law in Germany, and a good Austrian handbook by Walker was used in repeated editions by the few interested students.

*Switzerland.*⁴⁷ In the nineteenth century, only the legislation of Zurich aroused more than local interest from the viewpoint of conflicts law. At the beginning of the present century, the work of Meili, succeeding Brocher, was well known. It

⁴⁵ For details see GUTZWILLER, *Der Einfluss Savignys auf die Entwicklung des Internationalprivatrechts* 50, 56.

⁴⁶ *Einführungsgesetz* of August 18, 1896.

⁴⁷ *Treatises of BROCHER, MEILI, STAUFFER, BECK, SCHNITZER.*

has been followed more recently by the booklet of Stauffer, by Beck's extensive commentary on the Swiss enactments, and finally by treatises on private and commercial laws by Schnitzer.

*Greece.*⁴⁸ Greek legal science has exhibited much devotion to private international law. There are excellent contributions of recent date by G. Streit and Maridakis.

3. New Orientation

Roughly speaking, it may be contended that, until about 1925, in the Anglo-American orbit, the theoretical approach and, in the Continental literature, the practical understanding, left very much to be desired. Had minds such as those of Story and Bar continued to illuminate the way, grave mistakes and defects would have been avoided. The deplorable state of this branch of law was worse than the experts would acknowledge. A few overrated controversies were endlessly discussed. Other problems, often involving the simplest questions of daily occurrence, were neglected. Few things were certain, and there were more incongruities than in any other field of law. It needed the unspoilt mind of a newcomer to conflicts law to be appalled at the maze of confusion and injustice. Mancini's outburst at the absurd, deplorable anarchy in the conflicts rules is famous. In 1879 Frederick Harrison stated:

"There is a department of Law, the first principles of which have been furiously disputed by lawyers; the canons of which are hesitating and contradictory; the sources of which are themselves a matter of argument; having an authority which is most differently interpreted by doctors and judges; and a sphere which is understood in various ways;—and yet this branch of Law is attaining in our day continual development and fresh importance from a variety of causes, and in a manner often unobserved."⁴⁹

⁴⁸ Treatises of KALLIGAS, ŒKONOMIDES, KRASSAS, STREIT, MARIDAKIS.

⁴⁹ HARRISON, *Jurisprudence and the Conflict of Laws* 98.

Each word of this indictment, despite all efforts, remained true for half a century thereafter. Recently, Cook has described the American cases as "hopelessly contradictory and chaotic," even on the simplest questions.⁵⁰ This situation, bad enough in each particular country, is worse in a world in which conflicts laws are inconsistent. A marriage may be valid in one jurisdiction, invalid in another, previously valid but dissolved in a third. Such is the state of the contractual relation, regarded as the most solemn and sacred, whose existence or failure involves the most vital interests of the spouses, their issue, and their relatives. The reaction of the business world to the desperate plight of national conflicts laws—in the words of a terrified corporation lawyer, a veritable labyrinth,⁵¹—superimposed upon the divergent national commercial laws, has resulted in a striking phenomenon; international commerce has devised an elaborate network of arbitration and standard forms to eradicate these conflicts laws so far as feasible.

It is reassuring that a thorough revision now appears in the offing. On the one hand, the technical revolution of the means of communication reducing distances and destroying isolation and, on the other, the political and economic upheaval caused by the first World War, have made it clear that international life needs a better order. The peace and postwar treaties and the numerous international tribunals created after the war brought little improvement, but they did exhibit appreciation of this need and at the same time added a great many new problems.

In Germany,⁵² depressed and struggling for life, the situation was most acute, and the interest in foreign and inter-

⁵⁰ COOK, *Legal Bases* 136.

⁵¹ R. FRÄNKEL, "Der Irrgarten des internationalen Privatrechts," 4 *Zausl. PR.* (1930) 239, 241.

⁵² Treatises: see text. Monographs and papers: DUDEN, ECKSTEIN, H. LEWALD, NEUNER, RAAPE, RABEL, RAISER, WAHL, WENGLER.

national law became painfully alive. While, before the war, the otherwise richest juridical literature of the world had left comparative law and conflicts rules to very few scholars and no funds seemed available in the prosperous prewar times for research in these subjects, the distress of the war and postwar years reversed this attitude. The change of views was distinctively reflected in the creation of two comprehensively planned and broadly conceived institutes in Berlin, devoted respectively to foreign and international private law and to foreign public and international law (1924-1925).⁵³ In these institutes, facts and legal phenomena were to be collected, current problems defined, and the functions and purposes of legal institutions clarified by comparative research. With respect to conflicts of laws, the German cases had first of all to be collected. This undertaking was greatly facilitated by the works of Lewald and Melchior, who each for his own handbook assembled the materials, both the older and more recent. In 1926, the Institute of Foreign and International Private Law initiated a yearbook of German decisions⁵⁴ and commenced in its Review⁵⁵ to provide surveys of the foreign cases. To signalize this modified outlook, the Review celebrated the fiftieth anniversary of the Reichsgericht (1929) in a series of articles constructing special doctrines on the basis of judgments of this, the supreme court of Germany, comparable to the American style of treatment and entirely dissimilar to the usual European literature. It was one of the tasks of the Institute to answer inquiries of German courts, attorneys, and administrative authorities; in many hundreds

⁵³ "Institut für ausländisches und internationales Privatrecht" and "Institut für ausländisches Recht und Völkerrecht." For history and organization see RHEINSTEIN, "Comparative Law and Conflict of Laws in Germany," 2 U. of Chi. L. Rev. (1935) 232, 240.

⁵⁴ Die Deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts in den Jahren 1926 und 1927 (Berlin, 1928-).

⁵⁵ Zeitschrift für ausländisches und internationales Privatrecht (Berlin, 1926-).

of opinions, information on conflicts matters was given, extending knowledge and intelligent use of the applicable rules so that the gulf between theory and practice, which had existed since the end of the statist period, was almost closed.

German lawyers were amazed at the number and quality of the newly discovered precedents, which were soon given attention by several handbooks. Lewald (1930-1931) was the first to renovate the German conflicts law (excepting commercial matters) on the basis of decided cases, with well-considered conclusions. Melchior (1932), following the form of Dicey's treatise, regarded the decisions as a true source of law, supplementary to the Code; in this belief, he inquired primarily into the ideas underlying the cases and formulated rules of impressive originality. All other German writers deny the binding force of case law. Nevertheless, Nussbaum (1932) in his treatise devoted primary attention to cases and procedure and preferred a practical treatment to theoretical analysis. Raape (1931) provided a profuse exegesis of the provisions in the Introductory Law of 1896; because of its explicitness, this book will be most frequently cited in our survey as representing the German doctrines. Finally, Martin Wolff (1933) masterfully condensed the subject matter in a textbook, small in size but rich in content. More recently, Raape, the only one of these writers still in Germany, published a commendable introduction to the present German conflicts law (1938-1939).

Thus, the long-standing scarcity of production was replaced during a few years by a vigorous stream of literature. As deductive considerations gave way to practical studies, many values were modified. However, it is not in the nature of German students to sacrifice entirely systematic thinking to empirical considerations.⁵⁶ In addition to the treatises

⁵⁶ This seems to be disapproved by NUSSBAUM, Book Review, 40 Col. L. Rev. (1940) 1461, 1470, who condemns what he calls the new "logistic school."

mentioned, the learned outlines by Gutzwiller (1931) and a number of monographs (Neuner, Raiser, Wengler, etc.) contain good science. But for the time being too much had and still has to be corrected to allow much generalization.

This new German school quickly influenced other European countries. In conservative England, the pitiful state of conflicts law was suddenly subjected to refreshing criticism by Foster ⁵⁷ and Beckett; ⁵⁸ a new handbook by Cheshire challenged Dicey's leading treatise, the second edition appearing shortly after and extending the reforms suggested in the first. An admirable collaborative undertaking was initiated in Italy. Through the endeavors of Salvatore Galgano, commencing in 1927, several comprehensive periodicals were inaugurated, covering and annotating foreign decisions; of these, the *Giurisprudenza comparata di diritto internazionale privato* continued after the outbreak of the present war. Authors such as Babiński and Przybyłowski in Poland,⁵⁹ and younger scholars, including Vittorio Tedeschi and Ballardore-Pallieri in Italy, Fragistas, Vallindas and Zepos in Greece, von Steiger and Niederer in Switzerland, participate in this practical international co-operation.

A little later than in Europe, a corollary reform began in the United States and Canada.⁶⁰ Here, the enormous case material had been assembled by Beale as the basis of the Restatement. Immediately, new studies, criticizing antiquated doctrines and correcting inaccurate terminology, appeared by such eminent scholars as Lorenzen, Cook, Yntema,

⁵⁷ J. G. FOSTER, "Some Defects in the English Rules of Conflict of Laws," 16 Brit. Year Book Int. Law (1935) 84.

⁵⁸ BECKETT, "The Question of Classification ('Qualification') in Private International Law," 15 Brit. Year Book Int. Law (1934) 46.

⁵⁹ LEON BABIŃSKI, *Zarys Wykładu prawa międzynarodowego prywatnego* (Outlines of Private International Law) Vol. 1, 1935; KAZIMIERZ PRZYBYŁOWSKI, *Prawo Prywatne Międzynarodowe* (Private International Law) Vol. 1, 1935.

⁶⁰ See Cheatham, *Cases*, ix, x.

Cheatham, Falconbridge in Canada, Harper, Griswold and Stumberg, who also published a realistic handbook. Another modern treatise was devoted to the conflicts law of one particular state, Arkansas, by Leflar. The methodological postulates of this reform have recently been stated in Cook's magistral *Logical and Legal Bases of the Conflict of Laws* (1942). Numerous law review articles and a monograph or two, such as Hancock's book on torts,⁶¹ are promising for the future development of this branch of law.

The American literature has attracted much attention in France and Belgium, where its importance has been stressed by Barbey, Leprêtre, Wigny, and Batiffol, the last being the best informed French expert on foreign conflicts law and international needs.

A common feature of all these new attempts is the decided turning from deductive methods to considerations of policy. There are many other points of agreement, but also many controversies as respects method. Private international law has again become a young science, and children do have diseases.

It remains to summarize what has recently been done for research in foreign conflicts law. In the first place, foreign cases, enactments, and literature have been reproduced or reviewed on a large scale in the publications of the above-mentioned institutes in Berlin and Rome,⁶² as well as in other

⁶¹ MOFFATT HANCOCK, *Torts in the Conflict of Laws*, Michigan Legal Studies (Ann Arbor, Chicago, 1942).

⁶² Institute of Berlin: *Zeitschrift für ausländisches und internationales Privatrecht* (since 1926/27), containing continuous reviews of conflicts law in Austria, Belgium, France, Italy, Great Britain, the Netherlands, Switzerland, selected decisions involving conflicts law in the United States, Scandinavian cases, and reports from many other countries; *Deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts* (1928-); *Beiträge zum ausländischen und internationalen Privatrecht* (1928-). Rome Institute for Legislative Studies (Istituto italiano di studi legislativi), editor GALGANO: *Annuario di diritto comparato* (1927-); *Giurisprudenza comparata di diritto internazionale privato* (1932-) (among seven periodicals).

periodicals⁶³ and books of reference.⁶⁴ For an excellent collection of the enacted conflicts rules in force throughout the world, as of 1929—an indispensable work—we have to thank A. N. Makarov.⁶⁵ Under the auspices of the Hague Academy of International Law, many competent lecturers have treated the laws of particular countries as well as special problems of comparative interest.⁶⁶

In addition, Niboyet and La Pradelle, generously aided by foreign contributors, have published the *Répertoire de droit international*, which includes reports on the conflicts laws of many countries, some not previously examined, as well as articles on related topics in French law accompanied by comparative observations. Much information is given in the *Rechtsvergleichendes Handwörterbuch* of Schlegelberger, in which the conflicts laws of the world were, for the first time, described in an excellent, though sketchy, synthetic review (1933).⁶⁷ The treatise on *Greek Private International Law* (1937) of the distinguished Greek diplomat and scholar, G. Streit, and his valiant disciple, Vallindas, admirably indicates the literary doctrines of all countries. In the United States, Lorenzen⁶⁸ deserves commendation for attracting the

⁶³ Especially for Eastern Europe the periodicals of the Institute in Breslau (Osteuropa Institut): *Zeitschrift für osteuropäisches Recht* (1925-1927), later merged with *Ostrecht* into *Zeitschrift für Ostrecht* (1927-1934) and finally again, *Zeitschrift für osteuropäisches Recht* (Neue Folge, 1934-).

Internationales Jahrbuch für Schiedsgerichtswesen, edited by ARTHUR NUSSBAUM (Berlin, 1926-). American edition: *International Year Book on Civil and Commercial Arbitration* (New York, 1928-).

⁶⁴ BERGMANN, *Internationales Ehe- und Kindschaftsrecht* (2 vols., ed. 2, Berlin, 1938-1940).

⁶⁵ MAKAROV, *Das internationale Privatrecht der europäischen und ausser-europäischen Staaten. Erster Teil: Die Quellen des internationalen Privatrechts* (Berlin, 1929).

⁶⁶ Published in *Recueil des cours de l'Académie de droit international de la Haye* (1925-).

⁶⁷ *Internationales Privatrecht*, 4 *Rechtsvergl. Handwörterb.* (1933) 320-542.

⁶⁸ See in particular LORENZEN, "The French Rules of the Conflict of Laws," 36 *Yale L. J.* (1927) 731; 37 *ibid.* (1928) 849; 38 *ibid.* (1928) 165. *Id.*, "The Conflict of Laws of Germany," 39 *Yale L. J.* (1930) 804; 40 *ibid.* (1931) 401.

attention of the scholarly world to foreign conflicts laws. Finally, Arthur K. Kuhn has coordinated on broad lines American and European institutions of private international law (1937) and Nussbaum has published a volume of comparative observations on the general doctrines of common law and civil law (1943).⁶⁹

III. SOURCES

I. Codifications

The first considerable codification of conflicts rules was provided in articles 7 to 31, inclusive, of the Introductory Law that accompanied the German Civil Code of 1896. This body of rules had been elaborated carefully by Gebhard but, for somewhat obscure reasons, allegedly political, was reduced by Bismarck and the upper House so as to cover in its final form only a part of the subject matter. Contracts are left out entirely, and most rules are limited to cases in which the application of German law is required (so-called unilateral rules). What is more, these provisions lack the elaborate detail work for which the Code is famous. Nevertheless, the task was novel, and the skill and precision employed were high enough to impress contemporaries. Subsequently, this part of the German law served as a model for a slightly more extensive Japanese Law of June 15, 1898, and for a similar Chinese Law of August 5, 1918. The Hague Conventions of 1902 and 1905 on divers matters of conflicts law were based on the same principles, and they were in turn closely followed by the Swedish statutes of July 8, 1904, amended by later laws, and of June 1, 1912. Also, the excellent Austrian draft of 1913 of an international private law was conceived on the same

⁶⁹ Unfortunately I do not know more than the title of LÉVY ULLMANN, *Cours générale de droit international privé selon la méthode historique, jurisprudentielle et comparative* (année universitaire 1931-1932) stenographie publiée par "Les cours de droit" (licence, 3^e année).

lines; it served as the basis of the important Polish Law of August 2, 1926 (whose principal author Zoll had been a member of the Vienna draft committee), as well as for the frequently cited Czechoslovak draft of 1924 and 1931. Indirectly, the German law has influenced all more recent legislative projects in Europe.

The *Code Napoléon* of 1804 devoted to the problem of its territorial application only one article of the preliminary title and a few other dispersed provisions, and in European France there was no subsequent codification. Likewise, the Austrian Civil Code (1811), which is still in force in some regions, was satisfied with a few superficial rules (§§ 4, 34-37, 300), in contrast to the Prussian Landrecht (1794), which incorporated more comprehensive provisions, partly based on statist doctrine (see e.g., Introduction, §§ 27-49) and partly representing original ideas. The European and Latin American civil codes of the French type have retained the custom of touching on conflicts in a preliminary title, or law, but with gradual additions, for instance, Italy (1865, and enlarged in 1938 and 1942), the Netherlands (1829), Quebec (1866), Brazil (1942).

Recently, such preliminary provisions have taken the shape of short codifications in the civil codes of Greece (1940), Rumania (1939),⁷⁰ and Peru (1936).

Moreover, the statutory regulations of French Morocco (1913) and Spanish Morocco (1914), concerning relations between subjects and foreigners, include a number of modern conflicts rules based on the French doctrines. In the absence of codifications in the motherlands, these provisions are often cited. Suggestions for legislation have been made by learned

⁷⁰ The Civil Code and Code of Civil Procedure appeared in the Monitorul Of. on November 8, 1939, and were ratified by the Constituent Assembly by law of December 21, 1939, but the effective date was delayed to September 15, 1940. We are not informed whether these codes and the new Commercial Code, similarly deferred, are in force.

societies. In particular, a draft of the Society for Legislative Studies, concerning the status of foreigners in France and of Frenchmen in foreign countries,⁷¹ deserves attention. BARTIN considers this project as the legislation of tomorrow,⁷² but it is a singular document of overstressed nationalism.

A separate position has been taken by Switzerland. The statute of June 25, 1891, was mainly a regulation of the inter-state conflicts between the Swiss cantons having at that time full legislative power over private law. A few additional provisions incidentally considered Swiss citizens abroad (arts. 28-31) and foreigners in Switzerland (arts. 32-34). In 1912, when the Federal Civil Code of 1907 became effective, the significance of the statute of 1891 was limited to cases of the latter type; thus, international private law was left largely dependent upon these not too well-drafted sections and certain additions (C. C., final title, art. 59). What the Federal Tribunal has been able to do with this precarious legislation is noteworthy.

The most extensive national codification of conflicts law has been undertaken in the tiny principality of Liechtenstein; provisions dealing with conflicts have been inserted in the various chapters of a recent civil code, which has been partially promulgated. This codification is a curious mixture of clauses inviting big finance and reflecting inordinate nationalism.⁷³

2. Special Legislation

Conflicts rules on special matters exist, of course, in many countries. In numerous states of the United States, various uniform laws and other statutes deal with the conflicts aspects of marriage and wills; also provisions on immovable prop-

⁷¹ Deliberations and Project have been published in *Bulletin de la Société d'études législatives*; see the tentative draft in 24 *ibid.* (1928) 399; discussion 26 *ibid.* (1930) 76; and definitive text in 26 *ibid.* (1930) 175. BARTIN was president and NIBOYET reporter of the draft committee.

⁷² BARTIN, 2 *Principes* 201.

⁷³ See the review by WAHLE, 2 *Z.ausl.PR.* (1928) 134.

erty, contracts and capacity are frequent.⁷⁴ There is but one exceptional Federal enactment,⁷⁵ although Congress apparently has legislative power on the subject.⁷⁶

3. Multilateral Treaties

(a) *Montevideo Treaties*. The treaties on international law of Montevideo of February 12, 1889, are a worthy object of pride for the five countries that have ratified them, viz., Argentina, Bolivia, Paraguay, Peru, and Uruguay.⁷⁷ The first international agreements of their kind, they achieved an extensive unification, remarkable despite the close relationship of the legislations involved, facilitating cooperation. Of this unification, the treaties concerned with "international civil law" and "international commercial law," in particular, will be considered in the appropriate connections in the present book. To celebrate the fifty years' anniversary of the treaties, a conference was held in Montevideo in 1939 and 1940, which adopted considerable modernizations of the old rules.⁷⁸ How-

⁷⁴ An attempt to collect these and certain other statutory provisions has been made by MAKAROV, *Quellen* 242-266.

⁷⁵ U. S. C. tit. 22 § 72, see *infra* p. 238, n. 161.

⁷⁶ CHEATHAM, "Sources of Rules for Conflicts of Laws," 89 U. of Pa. L. Rev. (1941) 430, 441, 442.

⁷⁷ Texts: Official (Spanish) text in ERNESTO RESTELLI, *Actas y tratados del Congreso sudamericano de derecho internacional privado*, Montevideo 1888-1889 (1928).

French: MARTENS, 18 *Recueil général de traités*, 2^e série, 424-453; German: HECK in 1 *Z.int.R.* (1891) 339-340, 477-482; MEILI, *Die Kodifikation des internationalen Civil- und Handelsrechts* (1891) 103-138.

History: *Actas de las sesiones del Congreso sudamericano de derecho internacional privado*, Buenos Aires, 1889.

Literature: PRADIER-FODÉRE, "Le congrès de droit international sud-américain et les traités de Montevideo," in 21 *Revue Dr. Int.* (Bruxelles) (1889) 217-237, 561-577; SEGOVIA, *El derecho internacional privado y el Congreso sudamericano de Montevideo* (Buenos Aires, 1889); HECK, "Der Kongress von Montevideo und das internationale Vertragsrecht der südamerikanischen Staaten," 1 *Z.int.R.* (1891) 339-346, 477-483, 592-600; BEWES, "The Treaties of Montevideo, Text of 1889," 6 *Grotius Soc.* 1920, 59.

⁷⁸ Segundo Congreso sudamericano de derecho internacional privado de Montevideo, 1939-1940, published by Facultad de derecho y ciencias sociales, Instituto argentino de derecho internacional. For a first view of the contents, see RABEL, "The Revision of the Treaties of Montevideo on the Law of Conflicts," in 39 *Mich. L. Rev.* (1941) 517. English translation by J. IRRIZARRY y PUENTE and G. L. WILLIAMS in 37 *Am. J. Int. Law*, number 3, July, 1943.

ever, the new texts have not yet been ratified. For the most part, conflicts rules are contained in the treaties respectively concerning international "civil" law, the law of land commerce, and the law of maritime commerce. In the present volume, the first of these treaties is of special interest and will be referred to as the treaty of Montevideo.

(b) *Hague Conventions*. Widely praised but much less comprehensive, the Hague Conventions of 1902 and 1905 were concluded only after arduous efforts.⁷⁹ Their provisions cover but a few selected questions, and these they answer with many reservations on the part of the reluctant member states. With the exception of the relatively popular procedural

⁷⁹ Conventions of The Hague of 1902 and 1905. Official (French) text in MARTENS, 31 *Recueil général de traités*, 2^e série, 706-715; 6 *ibid.* 3^e série, 480-489.

English translation by ARTHUR H. KUHN, in F. MEILI, *International Civil and Commercial Law* (1905) 532; German translation in German *Reichsgesetzblatt* 1904, 221 ff.; RGBl. 1909, 409 ff., RGBl. 1912, 453 ff.; reproduced in MAKAROV, *Die Quellen des internationalen Privatrechts* (1929) 336 ff., 342 ff.; Italian translation in AMEDEO GIANNINI, *Le convenzioni dell'Aja di diritto internazionale privato* (Roma, 1925).

On the history of the Hague Conventions see *Actes de la Conférence de la Haye, chargée de réglementer diverses matières de droit international privé* (13-27 septembre 1893) (2 vols. in 1, La Haye, 1893); *Actes de la Deuxième Conférence de la Haye chargée etc.* (25 juin-13 juillet 1894) (La Haye, 1894); *Actes de la Troisième Conférence de la Haye pour le droit international privé* (29 mai-18 juin 1900) (La Haye, 1900); *Actes et documents de la Quatrième Conférence de la Haye pour le droit international privé* (16 mai-17 juin 1904) (La Haye, 1904). Provisions of national law and cases relating to the Conventions: J. KOSTERS and F. BELLEMANS, *Les conventions de la Haye de 1902 et 1905 sur le droit international privé* (La Haye, 1921), continued by surveys in 6 *Bulletin de l'Institut intermédiaire international* (1922 ff.), since 1933 under title of *Bulletin de l'Institut juridique international*. Literature: F. KAHN, *Die Dritte Haager Staatenkonferenz für internationale Privatrecht*, in *Grünhut's Z.* vols. 12, 13, and 15 (1903, 1905), also in KAHN, 2 *Abhandl.* 37-178, 303-444. BUZZATI, *Trattato di diritto internazionale privato secondo le convenzioni dell'Aja* (Milano, 1907); also French by F. REX (Paris, 1911). MEILI and MAMELOK, *Das internationale Privat- und Zivilprozessrecht auf Grund der Haager Konventionen* (Zürich, 1911); LEWALD, "Haager Konventionen zum internationalen Privatrecht," in STRUPP, 1 *Wörterbuch des Völkerrechts und der Diplomatie* 454-481; HEINSHEIMER, "Haager Zivilprozessabkommen," *ibid.* 487. M. TRAVERS, *La Convention de la Haye relative au mariage* (2 vols., Paris, 1912); TRAVERS, *La Convention de la Haye relative au divorce et à la séparation de corps* (Paris, 1909); TRAVERS, "La Convention de la Haye relative à la tutelle des mineurs et les accords antérieurs passés par la France," *Revue* 1912, 641.

treaty, they were ratified by only a few, though important, states and later partially deserted even by some of these.

In 1938, the conventions were binding upon the following states:

- (i) Convention to regulate the conflict of laws in regard to Marriage, of June 12, 1902.
Danzig, Germany, Hungary, Italy, Luxemburg, the Netherlands, Poland, Portugal, Rumania (old territory), Sweden, Switzerland.
- (ii) Convention to regulate the conflict of laws and jurisdictions in regard to Divorce and Separation, of June 12, 1902.
Danzig, Hungary, Italy, Luxemburg, the Netherlands, Poland, Portugal, Rumania (old territory).
- (iii) Convention to regulate the Guardianship of Minors, of June 12, 1902.
Belgium, Danzig, Germany, Hungary, Italy, Luxemburg, the Netherlands, Poland, Portugal, Rumania (old territory), Spain, Sweden, Switzerland.
- (iv) Convention concerning the conflict of laws relating to the Effects of Marriage on the rights and duties of the spouses in their personal relations and on the property of the spouses, of July 17, 1905.
Danzig, Germany, Italy, the Netherlands, Poland, Portugal, Rumania (old territory), Sweden.
- (v) Convention concerning Interdiction and similar Measures of Protection, of July 17, 1905. (Interdiction means the deprivation of an adult's competency to act legally.)
Austria, Danzig, Germany, Hungary, Italy, the Netherlands, Poland, Portugal, Rumania (old territory), Sweden.
- (vi) Convention concerning Civil Procedure, of July 17, 1905 (treats only the participation of foreigners in law-suits).

Austria, Belgium, Czechoslovakia, Denmark, Danzig, Esthonia, Finland, France (as to the signatories of the protocol of ratification of July 4, 1924), Germany, Hungary, Italy, Latvia, Luxemburg, the Netherlands, Norway, Poland, Portugal, Rumania (old territory), Spain, Sweden, Switzerland, Yugoslavia.

During the first World War, it was disputed whether the conventions were suspended as between the two belligerent groups. Italian courts negatived the question,⁸⁰ but it may be reopened in the present war.

A very important step has been taken by the Protocol signed at The Hague, March 27, 1931, recognizing the competence of the Permanent Court of International Justice to interpret the Hague conventions on private international law,⁸¹ acceded to by Belgium, Estonia, the Netherlands, and Portugal.

(c) *Código Bustamante*. This is a complete codification in 437 sections, including the entire international private law in 295 sections and in the remainder criminal and procedural conflicts law. Drafted by the Cuban jurist, Antonio Sánchez de Bustamante y Sirvén, this Code of International Private Law was adopted at the Sixth Pan-American Conference in Havana on February 20, 1928,⁸² and has been ratified by

⁸⁰ Especially App. Venezia (Oct. 9, 1917) Giur. Ital. 1917, I, 2, 440; also KOSTERS-BELLEMANS 493. For other opinions, see the survey by RÜHLAND, 32 Z.int.R. (1924) 74, 78.

⁸¹ Came into force April 12, 1936. 167 League of Nations Treaty Series (1936) 341.

⁸² Spanish text with Portuguese, French and English translations in 86 League of Nations Treaty Series (1929) 711; English and French in HUDSON, 4 Int. Legislation 2279 No. 186, 2283 No. 186a; French by PAUL GOULÉ in NIBOYET et GOULÉ, 2 Recueil de textes usuels de droit international (1929) 508. Also in BUSTAMANTE y SIRVÉN, Le Code de droit international privé et la Sixième Conférence panaméricaine (1929) 150. In German, books I and II by MAKAROV and REUPKE, in MAKAROV 397-418.

On the history of the Code, see ANTONIO SÁNCHEZ DE BUSTAMANTE y SIRVÉN, La Comisión de juriscultos de Rio de Janeiro y el derecho internacional (Habana, 1927), translated by GOULÉ: La Commission des juriscultes de Rio de Janeiro et le droit international (Paris, 1928); El Código de Derecho Internacional Privado y la VI. Conferencia panamericana (Habana, 1929),

fifteen Latin American states, viz.,⁸³

Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, and Venezuela.

Bolivia and Peru, having adhered to both the Montevideo Treaties and the Havana Treaty, have authoritatively declared the former to prevail in their relations with each other.⁸⁴

(d) *Scandinavian Treaty*. Extensive legislative cooperation among the Scandinavian countries,⁸⁵ fostered by their historic affinity, has found significant expression with respect to conflicts law in a convention concluded in Stockholm on February 6, 1931, by Denmark, Finland, Iceland, Norway, and Sweden, containing "provisions of private international

translated by GOULÉ: *Le Code de droit international privé et la VI^e Conférence panaméricaine* (Paris, 1929).

Literature: See primarily the works of the author of the Code, ANTONIO SÁNCHEZ de BUSTAMANTE y SIRVÉN (cited in the list of abbreviations), including his discussion of the application of the Code to Cuba in his *Manual de derecho internacional privado* (Habana, 1939). AUDINET, "Un projet de Code de droit international privé," *Revue* 1927, 1; FRAGA, "Die Kodifikation des internationalen Privatrechts in Amerika," 1 *Z.ausl.PR.* (1927) 563; KUHN, *Book Review*, 20 *Am. J. Int. Law* (1926) 631; 2 *Z.ausl.PR.* (1928) 480.

⁸³ For ratification and accessions to this and the subsequently mentioned treaties, see *League of Nations*, Official No. A.6.1939. Annex I. V.

⁸⁴ In signing the Código Bustamante, Bolivia reserved its obligations under the Montevideo Treaties. This has been held decisive for the relations between Bolivia and Peru by the Supreme Court of the latter country. *Decision of González*, Dec. 7, 1935, 2 *Tratados, convenciones y acuerdos vigentes entre el Perú y otros Estados* (1936) 516; LUIS G. ALVARADO, *Apuntes de derecho internacional* (1940) 60.

⁸⁵ Relatively uniform legislation on marriage, adoption and guardianship was introduced in Sweden, Denmark and Norway from 1917 to 1927, and Finland approximated its laws to this convention in 1925 and 1929. Conventions, including Iceland, followed on: *Collection of Maintenance Allowances*, of February 10, 1931 (English and French translations in 126 *League of Nations Treaty Series* (1932) 51; HUDSON, 5 *Int. Legislation* 885 No. 282); on *Recognition and Enforcement of Judgments*, of March 16, 1932 (139 *League of Nations Treaty Series* (1934) 181; HUDSON, 6 *Int. Legislation* 6 No. 305); on *Bankruptcy*, of November 7, 1933 (155 *League of Nations Treaty Series* (1935) 133; HUDSON, 6 *Int. Legislation* 496 No. 351); and on *Inheritance and Succession*, of November 19, 1934 (164 *League of Nations Treaty Series* (1935) 279; HUDSON, 6 *Int. Legislation* 947 No. 397, 953 No. 397a). Cf. UDDGREN, 9 *Z.ausl.PR.* (1935) 513; MARKS VON WÜRTEMBERG, 10 *Z.ausl.PR.* (1936) 711.

law in the field of marriage, adoption, and guardianship," in force from January 1, 1932.⁸⁶

(e) *Conventions on Negotiable Instruments*. Substantial success was attained in the two Geneva conventions of 1930 and 1931, providing a Uniform Law of Bills of Exchange and a Uniform Law of Checks:⁸⁷

- (i) Convention for the settlement of certain conflicts of laws in connection with Bills of Exchange and Promissory Notes, of June 7, 1930, in force from January 1, 1934.

Austria, Belgium, Danzig, Denmark, Finland, France, Germany, Greece, Italy, Japan, Monaco, the Netherlands, Norway, Poland, Portugal (without colonies), Sweden, Switzerland.

- (ii) Convention for the settlement of certain conflicts of laws in connection with Checks, of March 19, 1931, in force from January 1, 1934.

Danzig, Denmark (except Greenland), Finland, France, Germany, Greece, Italy, Japan, Monaco, the Netherlands, Nicaragua, Norway, Poland, Portugal (without colonies), Sweden, Switzerland.

⁸⁶ English and French translations in 126 League of Nations Treaty Series (1931) 141; HUDSON, 5 Int. Legislation 877 No. 281, 884 No. 281a; German translation and comment by BLOCH in 8 Zausl.PR. (1934) 627; VIGGO BENTZEN-HAMMERICH, "La récente Union scandinave de droit international privé," *Revue* 1934, 855.

⁸⁷ Official French and English texts in 143 League of Nations Treaty Series (1934) 317, 332, 409, 424; HUDSON, 5 Int. Legislation 550 No. 259, 558 No. 259a, and 915 No. 284, 924 No. 284a.

Comments: HUDSON and FELLER, "The International Unification of Laws Concerning Bills of Exchange," 44 Harv. L. Rev. (1931) 333 at 370; FELLER, "The International Unification of Laws Concerning Checks," 45 Harv. L. Rev. (1932) 668 at 692; ARMINJON et CARRY, *La lettre de change et le billet à ordre* (Paris, 1938); LEFSCOT, *La nouvelle législation de la lettre de change* (Paris, 1937); PERCEROU et BOUTERON, *La nouvelle législation française et internationale de la lettre de change, du billet à ordre et du chèque* (Paris, 1937); XAVIER JANNE, "L'unification internationale des lois sur les effets de commerce," 56 *Revue Dr. Int. (Bruxelles)* (1929) 52, 1 SYMMIKTA STREIT (1939) 477-483; LENHOFF, *Einführung in das einheitliche Wechselrecht*, (Wien, Berlin, 1933); QUASSOWSKI, "Die Genfer Abkommen über die Vereinheitlichung des Wechselrechts," 4 Zausl.PR. (1930) 770; DE SEMO,

In Yugoslavia, a law has approved all six Geneva conventions but no ratification seems to have occurred.

(f) *Other multilateral efforts.* On the fringe of our subject matter, recent important conventions have been concluded on the following topics: ⁸⁸

- (i) Protocol on Arbitration Clauses, opened for signature at Geneva, September 24, 1923. ⁸⁹

Alabama, Austria, Belgium, Brazil, Great Britain (and many parts of the British commonwealth), Czechoslovakia, Denmark, Danzig, Estonia, Finland, France, Germany, Greece, Italy, Japan, Luxemburg, Monaco, Netherlands, Norway, Poland, Portugal, Rumania, Spain, Sweden, Switzerland, Thailand.

- (ii) Geneva Convention on the Execution of Foreign Arbitral Awards, opened for signature at Geneva, September 26, 1927. ⁹⁰

Austria, Belgium, Great Britain (and parts of the British commonwealth), Czechoslovakia, Denmark, Danzig, Estonia, Finland, France, Germany, Greece, Italy, Luxemburg, the Netherlands, Portugal, Rumania, Spain, Sweden, Switzerland, Thailand.

- (iii) Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, opened for signature at The Hague, April 12, 1930, in force from July 1, 1937. ⁹¹

Ratifications or accessions until August 28, 1939, by Belgium, Brazil, Great Britain (all territories), Canada,

"L'unificazione internazionale del diritto cambiario," 7 *Annuario Dir. Comp.* (1932) 220.

⁸⁸ See list of ratifications and accessions League of Nations, Official No. A.6.1939. Annex I.V.

⁸⁹ 27 League of Nations Treaty Series (1924) 157; MARTENS, 19 *Nouveau recueil général de traités* 3^e série, 156; HUDSON, 2 *Int. Legislation* 1062 No. 98.

⁹⁰ 92 League of Nations Treaty Series (1929) 301; HUDSON, 3 *Int. Legislation* 2153 No. 183.

⁹¹ Text from League of Nations Document, C.224.M.111.1930.V; HUDSON, 5 *Int. Legislation* 359 No. 249.

Australia, India, China, Monaco, the Netherlands, Norway, Poland, Sweden.

- (iv) Simultaneously with the Convention under (iii), a "Protocol relating to a Certain Case of Statelessness" and a "Special Protocol concerning Statelessness" have been concluded,⁹² the first of which is in force from July 1, 1937 in Brazil, Great Britain' (with all territories), Australia, South Africa, India, Chile, China, the Netherlands, Poland, El Salvador.

More conflicts rules have been established in multipartite conventions providing uniform treatment of such matters as communication and transportation, with respect to problems that proved inaccessible to unification.⁹³

(g) *Drafts*. The tireless efforts of the Dutch Government in promoting the Hague Conferences on conflicts law were continued in 1925 and 1928,⁹⁴ and resulted in elaborate treaty drafts regarding the law of succession on death (1925 and 1928) and bankruptcy (1902 and 1928), which were not ratified. Moreover, certain provisions supplementary to the earlier conventions, referring in particular to persons without nationality or having more than one nationality, were adopted and, although not ratified, apparently have had some influence. Attempts to unify the conflicts rules on sales of goods, however, did not succeed.⁹⁵ Both political contrasts and doctrinal controversies contributed to all these failures.

⁹² League of Nations Document, C.226.M.113.1930.V; League of Nations Document, C.227.M.114.1930.V., HUDSON, 5 Int. Legislation 381 No. 251 and 387 No. 252.

⁹³ For example, see the rules concerning aviation, enumerated by HUDSON, 4 Int. Legislation 2354.

⁹⁴ Conférence de la Haye de droit international privé. Actes de la Cinquième Session tenue du 12 octobre au 7 novembre 1925 (La Haye, 1926). Documents relatifs à la Cinquième Session (La Haye, 1926). Actes de la Sixième Session tenue du 5 au 28 janvier 1928 (La Haye, 1928). Documents relatifs à la Sixième Session tenue du 5 au 28 janvier 1928 (La Haye, 1928). See accounts by KOSTERS in *Revue Dr. Int.* (Bruxelles) (1926) 156, 245; (1928) 813; (1929) 308, 791; TRAVERS, *Revue* 1926, 220; VOLKMAR, *JW.* 1926, 307; 1928, 857; JULLIOT DE LA MORANDIÈRE, *Clunet* 1928, 281.

⁹⁵ The remarkable last draft, by a Special Committee of June 2, 1931 has been published in 7 *Zausl.PR.* (1933) 957.

4. Bilateral Treaties

In addition to the multilateral treaties concluded under the auspices of the League of Nations, the postwar period of the 1920's and early 1930's produced numerous bilateral treaties, containing clauses promoting international intercourse. The subjects treated include status of foreign persons, both individuals and business organizations, judicial assistance, enforcement of foreign judgments, and the like, with occasional true conflicts rules interspersed. In this way, more progress was achieved than in any other, and for the first time Great Britain participated.

5. Case Law

It has already been noted that even in civil law countries conflicts rules to a large extent are judge-made. French and Belgian courts have to operate almost without any written rules. The manner in which German courts, from early times, have treated the problems in this field and have done so since 1900 in the absence of provision by the Introductory Law, has some similarity to Anglo-American practice.⁹⁶ The same is true of Switzerland, whose statute is insufficient, and in many other countries.

Consequently, the rules are flexible and incomplete, and very far from being frozen or petrified as certain theorists imagine. Precedents are reversed, when shown to be unreasonable.

In the United States, it is problematical whether conflict of laws is subject to general federal law, in addition to common law as coined in the different jurisdictions. It seems now settled that no such source of law is available to the federal courts in diversity of citizenship cases.⁹⁷ Except in such cases,

⁹⁶ See GUTZWILLER, 6 Zausl.P.R. (1932) 75.

⁹⁷ *Klaxon Company v. Stentor Electric Mfg. Co., Inc.* (1941) 313 U. S. 487; *Griffin, Administrator v. McCoach, Trustee* (1941) 313 U. S. 498.

the question is open⁹⁸ but has so far remained without practical importance. Federal courts may perhaps still subject conflicts rules regarded as procedural to an approach different than in state courts.⁹⁹

However, as may be noted by foreign readers, this question has nothing to do with the influence of the Federal Constitution, as developed by the Supreme Court of the United States, on the application of the conflicts rules. As the cases, in their overwhelming majority, involve the relations between two sister states of the Union rather than international intercourse with a foreign country, constitutional requirements respecting due process of law, interstate commerce, privileges and immunities of citizens, full faith and credit of acts, documents and judicial proceedings, or impairment of obligations, exercise a more or less intensive effect by unifying and controlling the solution of conflicts in the separate jurisdictions.¹⁰⁰

6. International Custom

Apart from treaties, is there any international conflicts law established by custom within the international community of states? According to an opinion universally obtaining, each member of this community is bound to have some sort of conflicts law, in order to leave to other states the power of adjudicating situations, persons or things, exclusively belonging to

⁹⁸ COOK, *Legal Bases* 108, 143.

⁹⁹ Note: "After *Erie Railroad v. Tompkins*: Some Problems in 'Substance' and 'Procedure,'" 38 *Col. L. Rev.* (1938) 1472; Note: "Congress, the *Tompkins* Case and the Conflict of Laws," 52 *Harv. L. Rev.* (1939) 1002; NUSSBAUM, *Principles* 62 ff.

¹⁰⁰ See the explanations to foreign readers by YNTEMA, "International-privatrechtliche Entscheidungen in den Vereinigten Staaten im Jahre 1926," in 2 *Z.ausl.PR.* (1928) 856; and LORENZEN, "The Federal Constitution of the United States of America as a Source of Private International Law," 3 *Recueil d'Études sur les sources du droit, en l'honneur de François Géný* (1934) 437-465.

their respective domains.¹⁰¹ What does this maxim practically mean, however, after Zitelmann's failure to derive the conflicts law from the requirements imposed by the law of nations upon states? Probably no tangible derivation can be found.¹⁰² Of course, outside of the domain of conflicts law, public international law has important aspects for the treatment of foreigners¹⁰³ and assumption of jurisdiction.¹⁰⁴

There are, finally, certain rules of almost universal force, such as the rules that the law of the situs governs immovable property, that a tort is governed by the law of the place where the allegedly tortious act transpires, or that the formalities of legal acts are determinable by the law of the place where they occur. These rules were established by statist doctrines at a time when state borders did not exist as today. But now these uniform rules are national. The law of nations never was their source. They are simply customary law of a great majority of states, though as such important. International courts have been glad to avail themselves of such rudiments of trans-national rules. The common law countries possess in common numerous additional rules of customary origin, which because of their significance are known as principles of conflict.¹⁰⁵ No conflicts rule, however, has attained, on the basis of international usage, a universal standing without ex-

¹⁰¹ Since SAVIGNY § 348, a constant principle. See for literature AGO, *Teoria* 70 n. 1, 82 n. 1, 126 n. 1, and for analysis BARTIN, 1 *Principes* 112.

¹⁰² MELCHIOR (skeptical), 36; RUNDSTEIN, "La structure du droit international privé et ses rapports avec le droit des gens," *Revue* 1936, 314, 512 at 536; FEDOZZI 116. *Contra*: CAVAGLIERI 49, 50; JITTA, *La méthode du droit international privé* (La Haye, 1890) 69; MAURY, 57 *Recueil* 1936 III 325, 355. CHEATHAM, "Sources of Rules for Conflict of Laws," 89 *Univ. of Pa. L. Rev.* (1941) 430 at 434 ff., mentions three cases of diplomatic intervention without result.

¹⁰³ See M. WOLFF, *IPR*. 8.

¹⁰⁴ See CHEATHAM, 89 *Univ. of Pa. L. Rev.* (1941) 430 ff., *supra* n. 102.

¹⁰⁵ BURGE, 2 *Colonial and Foreign Law* 29-36 (Statement of Principles); 1 WHARTON 1 ("preliminary principles"); DICEY (Table of Principles and Rules) LXV-CXXXIV.

ception, equivalent to that of the general principles of the *jus gentium*.

7. Conclusion

It is notable that of the enacted or restated conflicts rules existing today in the world, only the two Latin American multipartite treaties and the Restatement, the latter not a law but purporting to reproduce the law, are comparable in comprehensiveness and elaborateness to codifications of private law as known to lawyers in most countries. The remaining efforts, rudimentary if not poor, contrast strikingly with the usual fondness of civil law countries for statutes and codes¹⁰⁶ and even with the recent increase of legislation in Anglo-American jurisdictions. Niboyet once tried to justify the complete absence of French legislation on conflicts law by the elusive nature of the subject.¹⁰⁷ But the chaotic brilliance of the French literature and practice suggests rather that the preparation for crystallizing the law has been insufficient. The German enactment as a whole is so unsatisfactory that, as early as 1927, a movement for a new codification appeared.¹⁰⁸

However, the two copious formulations of conflicts law achieved in the Western hemisphere have remarkably analogous defects, despite their very different history, function, and character. The American Restatement has been accepted in the courts and, it seems, in the literature, to the extent that it reflects the actual cases or clarifies controversial issues. Its doctrinal background has been repudiated almost unanimously. Hence, many rules asserted in the Restatement as flowing from principles are devoid of authority. The Havana Code introduced a great wealth of refined provisions in the laws of

¹⁰⁶ For the predilection of civil law countries for statutes, attention may be recalled to SPERL, "Case Law and the European Codified Law," 19 Ill. L. Rev. (1925) 505.

¹⁰⁷ NIBOYET, 26 Bull. Soc. d'Études Lég. (1930) 77.

¹⁰⁸ Mitt. Deutsche Ges. f. Völkerrecht, Dresden Meeting 1927.

the participant states¹⁰⁹ and is admired throughout Latin America. But, as the Code largely rests on a selection among literary opinions, mostly of French writers, its practical usefulness has yet to be tried in the fire of litigation. Of such confirmation, nothing is known so far. As all doctrinal studies of the Code evidently suggest, there are certain difficulties in analyzing its rules.

Once more, the immaturity of this branch of law appears and its need of intensive, prolonged cultivation.

¹⁰⁹ Occasionally, the thesis has been adopted that the code represents the general law of the country. Thus, the Brazilian Supremo Tribunal Federal, sentença estrangeira no. 993 (July 17, 1940) 58 Arch. Jud. 83 has applied its jurisdictional rules in relation to Portugal. Similarly, the Supreme Court of Peru (July 2, 1929) 25 Anales Jud. (1929) 78 has termed the Montevideo Treaty "the law of the land" in relation to Japan.

CHAPTER 2

Structure of Conflicts Rules

I. THE PARTS OF THE RULE

INTELLIGENT application or development of conflicts rules requires full awareness of the two parts of which these rules are necessarily composed. Thus, although it need not exactly conform to the example, a typical conflicts rule runs as, for instance, section 295 of the Restatement:

(1) The validity of a trust of movables created by a will
(2) is determined by the law of the testator's domicile at the time of his death. (Numbers added.)

The first part of the rule defines its object, that is, certain operative facts,¹ the legal consequences of which are determined in the second part. From another point of view the first part raises, and the second part answers, a legal question. In comparison with ordinary legal rules, there is one, a fundamental, difference. The legal effects of an ordinary rule of law are fully indicated; the question raised is immediately solved by commanding or prohibiting or authorizing certain conduct. ("Material," "substantive," "internal" rules, in German, *Sachnormen*.) In contrast, conflicts rules decide only which state shall give such immediate solution. The specific quality of these rules resides therefore in the second part that declares the municipal law to which the question should be referred or "connected" (in German, *angeknüpft*) or, in other words, prescribes the legislative domain in which the question should be "localized." (There is no point in arguing which mode of thinking represented by these expressions is prefer-

¹ German: "Tatbestand," translated by LEA MERIGGI, *Revue* 1933, 201 at 205, n. 1, into Latin: "substratum" (subject matter); Italian: "presupposto" (premise).

able.) An essential element of conflicts rules, therefore, is the indication of a "connecting factor" or "point of contact" (*Anknüpfungspunkt*, *point de rattachement*)²—the testator's domicile as of the time of death in the case above, or in other cases the situs of property, the place where a contract was concluded or where it is to be performed, etc. In this line of thought, the facts localized by the connecting factor appear separately as the "thing connected." In the example above, these facts form the first part of the rule, while the connecting factor appears in the second part. For the sake of simplicity, we shall continue to conceive of the rule in the manner stated, although, in some conflicts rules, the localizing elements or some of them, are inserted in the first part.

Strangely enough, the misfortunes of the doctrine taken over from the nineteenth century have been caused largely by insufficient attention to this nature of the conflicts rules. As will be seen hereafter, the parallelism of the first part with substantive rules was overlooked, and the basic peculiarity in the second part was not consistently appreciated.

Part of the confusion lay in the traditional notion of "the law of the forum." *Lex fori* once meant the entire set of legal rules in force at the place of suit. In a system of pure territorialism, every tribunal either applies its own law as a whole or dismisses a case found to belong to a foreign jurisdiction. There is no choice of law, no application of foreign law in such a system—a system which was observed in England with more consistency than anywhere else and is still represented in many conceptions of Anglo-American law. If the entire "law of the forum" be considered a unit, conflicts rules are in effect integrated with the internal law. But when assumption

² Term introduced by KAHN, *cf.* NEUMEYER, 3 *Zausl.PR.* (1929) 261, translated as point of contact by LORENZEN, and as connecting factor by FALCONBRIDGE. For recent discussion, see FALCONBRIDGE, "Characterization in the Conflict of Laws," 53 *Law Q. Rev.* (1937) 235, 537 at 549. CORMACK, "Renvoi, Characterization, Localization and Preliminary Question in Conflict of Laws," 14 *So. Cal. L. Rev.* (1941) at 241, "localization."

of jurisdiction no longer implies application of the domestic rules and there exist choice of law rules, the latter must live apart from the internal set of rules. At this stage of development, appropriate language can designate as law of the forum only the pure internal law, strictly excluding conflicts rules.

Likewise, the extensive recent discussion, under the French catchword of "qualification,"³ of the nature and function of the law of conflicts has been a source of difficulty. BARTIN, the author of this expression, assumed that conflicts rules are an inseparable part of the law of the forum⁴ and that, accordingly, the legal terms used in a conflicts rule must by logical necessity be explained ("qualified") in terms of the peculiar concepts of the *lex fori*. Had it not been for this theory, characterization would never have attained the role it occupies in the present literature. In fact, as that theory has suffered increasing exceptions and modifications, the term qualification has become uncertain. The writers argue which characterization problems are genuine and which false and even whether characterization is of immense or minimal significance. Such terminological disputes should be ended.

The real subject of the basic debate about conflicts law is the interpretation of the rules of conflicts. This is essentially broader than commenting on expressions. Moreover, it furnishes a clearer objective than does reference to some substantive law, for evidently conflicts rules have to be interpreted by exploring their own meaning rather than the meaning of something else, e.g., an internal rule. Emphasis should be shifted from "characterization" to "interpretation."

³ While KAHN spoke of "latent conflicts of law," BARTIN's term "qualification" became usual in Europe. BECKETT and CHESHIRE translate it by "classification," FALCONBRIDGE proposed "characterization" and is generally followed. See FALCONBRIDGE, 53 LAW Q. REV. (1937) 235 at 239, *supra* n. 2. For another survey, see VAN PRAAG, "Bijdrage tot de leer der kwalifikaties in het internationaal privaatrecht," *Rechtsgeleerd Magazijn Themis* 1939, 525.

⁴ See *infra* n. 9.

If nevertheless characterization is to retain a technical meaning, it may be used to denote the problem whether or not a certain expression in a conflicts rule has the same connotation as a similar word employed by domestic law or in a foreign system.⁵ Characterization of facts as such is not significant of conflicts law.

The most important objective in interpreting a conflicts rule is to determine its scope. The borderline, for instance, delimiting the cases for which the conflicts rule on contracts prescribes the applicable law from those subject to the conflicts rule concerning torts, must be marked in every conflicts system. This process may be termed *classification* in the proper sense.

II. THE FIRST PART: THE OBJECT OF THE RULE

The statist doctrine classified each *substantive rule* of positive law in one of three categories, territorial law (*statuta realia*), extraterritorial law (*statuta personalia*), and "mixed statutes" (*statuta mixta*), the last-named category being assimilated to the first by the late French and the Dutch school. Thus, in the statist conception, the object of conflicts law is the substantive rule of law. The substitution for this of the legal relations between persons or of persons to things by Savigny constitutes the chief advance from this to the modern conception. Savigny and his followers, who apparently are still numerous, therefore deemed it to be the characteristic task of conflicts law to connect each single "legal relation" with a certain country.

This conception, despite its advantages, still was not quite correct. Its consequences, as later deduced by Franz Kahn, demonstrate that the mistake was not harmless. The starting point of analysis, as should be obvious, ought not to be the

⁵ RABEL, 5 Z.ausl. PR. (1931) 253.

legal relation, e.g., an obligation, a property right, the relation between spouses. Any such relation must be based on a determinate legal system. Which system, when the applicable law is not even yet contemplated? At this stage, there is nothing but a factual or "social" situation.⁶ If two persons of Greek Orthodox faith go through a marriage ceremony before a Greek Orthodox priest in Paris, is this a marriage? The answer depends on what law we apply: the law of the forum, the French law, the Greek law, or perchance some other law. No court except in Greece, however, would actually apply its own internal law to the question. Nevertheless, Kahn and the many who share his view assume that the legal relationship of marriage as constituted under the domestic law of the forum is exclusively the object of the conflicts rule. This makes no sense; it is simply a way out of embarrassment in order to find some legislation containing the allegedly necessary definition of such object. Evidently, conflicts rules must operate as do all other rules, directly on the facts of life, not on a legally predicated, abstract subject matter. They refer to merely factual events, such as the marriage ceremony before the Greek priest, a document concerning the sale of a movable, a declaration by a married woman, purporting to transfer property, the death of an individual leaving no will, *et cetera*.

This statement is of cardinal significance; it ends all speculation about the necessary dependence of conflicts rules on some legal system, whether the law of the forum or the

⁶ RABEL, 5 Z.ausl.PR. (1931) at 243; reproduced in Revue 1933, 1 at 5 ff., followed by NEUNER, Der Sinn (1932); M. WOLFF, IPR. 1; DE CASTRO, "La cuestión de las calificaciones en el derecho internacional privado," 20 Revista Der. Priv. (1933) 217 at 240, 265 at 280, 282; VALLINDAS, Book Review, 1 Archeion Idiotikou Dikaïou (1934) 176; MEZGER, Decision Note, Revue Crit. 1935, 447; 1 STREIT-VALLINDAS (1937) 243; FALCONBRIDGE, 53 Law Q. Rev. (1937) 235 at 242, *supra* n. 2; ROBERTSON, Characterization 63; HUSSERL, "Foreign Fact Element in Conflict of Laws," part II, 26 Va. L. Rev. (1940) 453 at 471. More precisely, the object has been described as a factual situation taken *in abstracto*; see MERIGGI, Revue 1933, 205, or as the facts underlying the relation which is mentioned by the conflicts rule and taken *in abstracto*, see NEUNER, "Die Anknüpfung im internationalen Privatrecht," 8 Z.ausl.PR. (1934) 81, 85. (Erroneous criticism by DE CASTRO, 20 Revista Der. Priv. (1933) 239, 241, *supra* this note.)

lex causae. This supposition was engendered by the short manner in which conflicts rules have been generally framed, as for example:

Immovables, even those possessed by foreigners, are governed by French law. The laws concerning the status and capacity of persons govern a Frenchman, even resident abroad. (French C.C. art. 3.)

Or, when the rules became more detailed:

The capacity of a person is to be determined according to the laws to which the person belongs. Personal relations between German spouses, even though domiciled abroad, are governed by the German laws. (German E.G. art. 7 par. 1, art. 14 par. 1.)

Broad stretches of subject matter have thus customarily been indicated by abbreviated terms, seemingly corresponding to the captions of large chapters of private law, such as capacity, relation between spouses, inheritance, *et cetera*. But this is merely the technique of shorthand expression.

III. INTERPRETATION AND CHARACTERIZATION

No doubt such legal terms ordinarily have been taken from the headings used in the civil code or accepted legal classification of the forum. But was that always so, must it so remain; is the interpretation of such a term bound to its specific significance in the internal law?

1. *Lex Fori*

Franz Kahn,⁷ in his elaborate earlier opinion, which to a vaguely defined extent he later revoked,⁸ and Bartin,⁹ who

⁷KAHN, *Gesetzeskollisionen: ein Beitrag zur Lehre des internationalen Privatrechts* (1891) 1 Abhandl. 1, especially "Latente Gesetzeskollisionen" at 92.

⁸KAHN, *Über Inhalt, Natur und Methode des internationalen Privatrechts* (1899), 1 Abhandl. 255 at 312.

⁹BARTIN, "De l'impossibilité d'arriver à la suppression définitive des conflits de lois," *Clunet* 1897, 225, 466, 720, reprinted in BARTIN, *Études* (1899) 1; BARTIN, 1 *Principes* (1930) 221; BARTIN, "La doctrine des qualifications et ses rapports avec le caractère national des règles du conflit des lois," 31 *Recueil* 1930 I 565.

first sponsored the theory, considered it a matter of course that when a conflicts rule speaks of domicile or marriage settlement or tort, it meant exactly what such expression signifies in the corresponding domestic law. This theory has had an immense following¹⁰ and has been adopted in the Restatement¹¹ and the *Código Bustamante*.¹² Logical as well as so-called practical arguments have been adduced in quantity to prove this assertion;¹³ they may now also be found reproduced in English¹⁴ and need no repetition.

2. *Lex Causae*

Another opinion went in the opposite direction; the terms or concepts of the conflicts rule should be understood according to the foreign internal law referred to by the conflicts rule itself. Originated by the French Despagne, and recently revived by Pacchioni and M. Wolff,¹⁵ this theory has been

¹⁰ For lists see MELCHIOR 110 § 78; MAURY, "Règles générales des conflits de lois," 57 Recueil 1936 III 325 at 467. To mention the most significant names, in France: ARMINJON, H. DONNEDIEU DE VABRES, LEREBOURS-PIGEONNIÈRE, NIBOYET, SURVILLE, WEISS; in Belgium: POULLET, DE VOS; in Germany: GUTZWILLER, LEWALD, MELCHIOR, NEUMEYER, NUSSBAUM, RAAPE, ZITELMANN; in Italy: ANZILOTTI, AGO, BUZZATI, CAVAGLIERI, FEDOZZI, PERASSI, SALVIOLI, UDINA; in the Netherlands: KOSTERS, MULDER.

More recently in Britain and the United States: CHESHIRE; LORENZEN, "The Theory of Qualification," 20 Col. L. Rev. (1920) 247; LORENZEN, "The Qualification, Classification, or Characterization Problem in the Conflict of Laws," 50 Yale L. J. (1941) 743; FALCONBRIDGE, 53 Law Q. Rev. (1937) 245, *supra* n. 2; cf. "Renvoi, Characterization and Acquired Rights," 17 Can. Bar Rev. (1939) at 373; ROBERTSON, Characterization 24; CORMACK, Renvoi, 14 So. Cal. L. Rev. (1941) 221 at 223, *supra* n. 2.

¹¹ Restatement § 7.

¹² Código Bustamante art. 6. Also the Rumanian Draft of 1933, art. 66; cf. ANTONESCU, Revue 1933, 155 at 171.

¹³ See especially NIBOYET no. 416.

¹⁴ See BECKETT, "The Question of Classification ('Qualification') in Private International Law," 15 Brit. Year Book Int. Law (1934) 46, esp. 53 ff.; ROBERTSON, Characterization 59.

¹⁵ DESPAGNE, "Des conflits de lois relatifs à la qualification des rapports juridiques," Clunet 1898, 253; DESPAGNE et DE BOECK, Cours de droit international public (ed. 4, 1910) no. 106 *bis*; M. WOLFF, IPR. 34 ff.; PACCHIONI, Elementi 167; partly also NEUNER, Der Sinn, and FRANKENSTEIN, "Tendances nouvelles du droit international privé," 33 Recueil 1930 III 245 at 313.

generally rejected.¹⁶ In the present writer's opinion, which is not here elaborated, the solutions sought by Wolff are acceptable in special circumstances, but not in principle.¹⁷

3. Comparative Method

A third opinion, which, in opposition to both these dogmas, advocates a method rather than a doctrine,¹⁸ was expounded by the present writer in 1929 and 1931.¹⁹ In this view, the factual situation, which is the true premise of any conflicts

¹⁶ For a resume of the almost general rejection, see MAURY, "Règles générales des conflits de lois," 57 Recueil 1936 III 325 at 484.

¹⁷ See *infra* p. 60.

¹⁸ Rightly MAURY, 57 Recueil 1936 III 325 at 477.

¹⁹ RABEL, 3 Z.ausl.PR. (1929) 752 at 755; RABEL, "Das Problem der Qualifikation," 5 Z.ausl. PR. (1931) 241, (in Italian) 2 Rivista Italiana (1932) 97, (in French) Revue 1933, 1.

In the same sense: in Belgium: WIGNY, Revue Crit. 1936, 392; England: BECKETT, "The Question of Classification ('Qualification') in Private International Law," 15 Brit. Year Book Int. Law (1934) 46; France: J. DONNEDIEU DE VABRES 765; Germany: NEUNER, Der Sinn (1932); SILBERSCHMIDT, 48 Z.int.R. (1933-34) 313 at 334 and 54 Zentralblatt (1936) at 17; Italy: MERIGGI, "Saggio critico sulle qualificazioni," 2 Rivista Italiana (1932) 189, (in French) Revue 1933, 201, (in English) 14 B.U.L. Rev. (1934) 319; ZANCLA, Sede di fatto del rapporto, Atti dell'Accad. Pelorit. (1936) 18; Spain: DE CASTRO, 20 Revista Der. Priv. (1933) 240 at 245, *supra* n. 6 (in part divergent); Switzerland: WERNER NIEDERER, Die Frage der Qualifikation als Grundproblem des internationalen Privatrechts, in Zürcher Studien z. internat. Recht, no. 1 (Zürich, 1940); VON STEIGER, Die Bestimmung der Rechtsfrage im internationalen Privatrecht, Abhandlungen zum Schweizerischen Recht, 129 Heft, (Bern, 1937). (The Federal Tribunal has left the decision open; see BG. (Feb. 24, 1939) 65 BGE. II 66, 71; BG. (Oct. 30, 1940) 30 Praxis 63 no. 1, at 64). NEUNER and MERIGGI, however, add essential propositions of their own. Practical application of this method to particular problems has been made by WERNER VON SIMSON, Die materiellen Wirkungen des rechtskräftigen Urteils im internationalen Privatrecht (Thesis, Freiburg i.Br., 1935); H. P. ZSCHOKKE, Die Rechtsstellung internationaler Kartelle, Schweizerische Vereinigung für Internationales Recht, Druckschrift no. 35 (1936); HANS H. RIEMANN, Die Schuldverträge im internationalen Privatrecht (Dresden, 1939) v and 9.

United States: CHEATHAM, "Internal Law Distinctions in the Conflict of Laws," 21 Cornell L. Q. (1935) 570, warns against "two closely related practices" (p. 589), viz., (1) "the uncritical transfer to Conflict of Laws of the meaning given to a term in internal law," and (2) "the use of a distinction worked out in internal law as decision of an issue in Conflict of Laws without adequate consideration of whether the internal law distinction is appropriate to the other issue."

rule, must be referable indifferently to foreign as well as to domestic substantive law. Hence, if legal terms are used to describe this factual situation, they must be susceptible of interpretation with reference to foreign institutions, even those unknown to the *lex fori*. This operation includes comparative research. Thoughtful courts have always employed this method, but systematic efforts are needed gradually to free national conflicts rules from undue dependence on internal conceptions.

For example, the first theory above was resorted to in the English case, *Leroux v. Brown*,²⁰ in which the parties in France made a contract satisfying every condition of validity under French law. However, the action failed on the ground that the statute of frauds imposes a rule of procedure, which as such must be observed by all litigants in England. Consequently, the conflicts rule on "formalities" was deemed inapplicable. This decision has been severely criticized.²¹

Although the case conforms to the *lex fori* doctrine dominant in the United States, it has been generally disapproved by American courts and writers.²² Moreover, it appears that in this country foreign statutes of frauds are deemed to prescribe formalities as defined by the conflicts rule relating to formalities, though such statutes may be otherwise interpreted in the various jurisdictions for other purposes. This construction agrees with the third theory above.

The reason for this solution is obvious. It offends justice²³

²⁰ (1852) 12 C. B. 801.

²¹ See BECKETT, "The Question of Classification ('Qualification') in Private International Law," 15 Brit. Year Book Int. Law (1934) at 69 § 18; CHESHIRE 248 and 636; FALCONBRIDGE, "Conflict of Laws: Examples of Characterization," 15 Can. Bar Rev. (1937) 220, 224, is doubtful, however.

²² *Straesser Arnold Co. v. Franklin Sugar Refining Co.* (1925) 8 F. (2d) 601; *Ohlendiek v. Schuler* (1929) 30 F. (2d) 5; *WILLISTON*, 2 Contracts § 600.

²³ See *Lams et ux. v. F. H. Smith Co.* (1935) 36 Del. 477, 178 Atl. 651, *Clunet* 1937, 873; *LORENZEN*, Cases (ed. 4, 1937) 458; *CHEATHAM*, Cases (ed. 2, 1941) 549; *LORENZEN*, "The Statute of Frauds and the Conflict of Laws," 32 Yale L. J. (1923) 311, 320; *GOODRICH* 207; 3 *BEALE* § 602.1.

to deny enforcement of an oral contract complying with local requirements of form, for the mere reason that the domestic law requires a memorandum in writing. Conversely, a contract unenforceable where executed, may be deemed to depend on such other contacts as the conflicts rule of the forum admits; thus, by the applicable conflicts rule, a contract may be considered valid under the law of the place of performance. But, if under the conflicts rule the transaction has no connection with the forum, it cannot be validated by the municipal law of the forum. The object of the conflicts rule on formality thus may include foreign statutes of frauds and exclude the domestic statute, irrespective of domestic classifications.

The prescriptions of the domestic statute of frauds indeed may be considered to relate to procedure in a court for the purpose of their application *ex officio*, irrespective of formal demand by a party, or to determine whether failure to observe the statute constitutes reviewable error, as well as to decide whether amendments thereof have retroactive effect. The purposes of conflicts law are different. In fact, the English writers seem to regret *Leroux v. Brown* only because of its implications for conflicts law. French ²⁴ and German ²⁵ courts classify provisions concerning oral agreements as formalities in all respects, and certainly not as procedure, the only doubt being whether they do not affect the substantive requisites of consent to a contract.

In consequence, an American, French, etc., court has to apply the English statute of frauds, or the special provision of section 4 of the British Sales of Goods Act, respectively, to an English transaction, in particular to an agreement to

²⁴ Cass. (req.) (April 18, 1865) S.1865.1.317; Cass. (civ.) (June 29, 1922) D.1922.1.127, S.1923.1.249.

²⁵ Unanimous. For a foreign provision prescribing written contracts, see KG. (Oct. 25, 1927) JW.1929, 448, IPRspr. 1929, no. 7. See also the definition of formalities in art. 3 of the Geneva Convention of 1930 for the settlement of certain conflicts of law in connection with Bills of Exchange and Promissory Notes.

sell concluded in England. (That this is true, although the English courts reach the same result on procedural lines, in the case of English transactions, needs some comment in our later discussion.)²⁶

There is very little doubt, in fact, that conflicts law has its own denotation of formality, independent of either the *lex fori* or the *lex causae*.²⁷

Without resuming all arguments of the vivid controversy that went on during the last decade, it may be stated that the *lex fori* theory has visibly shrunk under the weight of the attacks to which it has been subjected. In the first place, there seems today little support for the once-pretended logical necessity of resorting to domestic notions, Niboyet's *argument de nécessité*. There still are die-hards,²⁸ it is true. While even Bartin conceded two "exceptions" to the principle of characterization according to the domestic ideas, some of his followers have insisted on its pure application. In particular, Bartin saw that the question whether foreign-situated property is movable or immovable, is almost universally decided according to the law of the situs and not to the *lex fori*.²⁹ This is clearly a sound rule and, thanks to its adoption throughout the world, an oasis of uniformity; but important writers have protested.³⁰ Franz Kahn diluted his own axiom even more; he states that a rule referring "parental power" or "tort" to some foreign law does not mean exclusively what the civil code of the forum means by such terms, but also includes "the corresponding and similar foreign notions." Only the "nucleus of the foreign institu-

²⁶ *Infra* p. 66.

²⁷ This problem will be treated in connection with the requirements for contracts.

²⁸ A climax was reached by RUNDSTEIN, "La structure du droit international privé et ses rapports avec le droit des gens," *Revue Dr. Int. (Bruxelles)* (1936) 314, 512, who declares any separate development of conflicts law "logically" impossible. *Contra*: BALOGH, 1 *Symmikta Streit* (1939) 88.

²⁹ This is now for BARTIN the "only true exception," 1 *Principes* 236.

³⁰ NIBOYET no. 418 and 2 *Répert.* 411 no. 27; KAHN, 1 *Abhandl.* 76; and others.

tion" must be similar, not the "technical envelope."³¹ For this acute thinker, a half-century since, the *lex fori* was not an infallible guide, but rather a signpost showing vaguely a direction.

At present, the advocates of the *lex fori* theory, conscious that the theory must be justified by convenience rather than logical necessity,³² are entangled in difficult efforts to avoid absurd results. They feel, for instance, free to concede that a concept such as contract or tort may have a much broader scope in conflicts law than in private law.³³ Again, the German conflicts rule (EG. art. 21) concerning the right of an unwed mother to claim support from the illegitimate father of her child, is strictly predicated upon a rule of the German Civil Code specifically granting such right; Raape recognizes this connection but nevertheless suggests the application of the rule to an essentially different claim under Norwegian law and to certain even more remote types of actions for damages under other laws.³⁴ For such analysis of the compass of conflicts rules, he employs comparative methods as a matter of course. Nussbaum, who on the contrary is a decided foe of comparative methods in the subject, yet applies the conflicts rules regarding wrongs to liabilities without fault, irrespective of the treatment in internal law, construes terms such as "company" or "corporation" "in the freest manner," and particu-

³¹ KAHN, 1 Abhandl. 112 (1891), generally followed up to 1931, although KAHN himself sensed the futility of this escape in 1899, see 1 Abhandl. 311; cf. RABEL, *Revue* 1933, 20, 24.

³² ROBERTSON, *Characterization* 74; LEWALD, *Règles générales des conflits de lois* 77.

³³ AGO, "Règles générales des conflits de lois," 58 *Recueil* 1936 IV 247 at 337; MAURY, "Règles générales des conflits de lois," 57 *Recueil* 1936 III 325 at 494; FEDOZZI 186. See also the criticism by PACCHIONI, *Elementi* 181. GUTZWILLER, also a follower of the *lex fori* theory, has seen that the Mixed Arbitral Tribunals have applied numerous general legal concepts of the civilized world, or of the civil law countries (see "Das Internationalprivatrecht der durch die Friedensverträge eingesetzten Gemischten Schiedsgerichtshöfe," 3 *Int. Jahrbuch f. Schiedsgerichtswesen* (1931) 123 at 149 ff.).

³⁴ RAAPE, 50 *Recueil* 1934 IV 401 at 452, 524.

larly recommends "flexible methods" and "broad" interpretation.³⁵ Maury³⁶ ends his apology for the *lex fori* with the following recipe:

One starts from the *lex fori*, from its concepts. But these concepts are adapted first to their international function and then enlarged by a comparison with those of the foreign laws. We approach the viewpoint of Mr. Rabel, but we do it rather modestly.

This dictum has been adopted by Robertson³⁷ with a qualification. He avows that

"some categories (of conflicts law) will be quite different from any category of the internal law, because designed to make provision for institutions of the foreign law not known to the internal law of the forum."

Such independent categories, he confesses,

"are already known to have been developed for most types of cases that are likely to arise, such as contract, tort, succession, administration, matrimonial property, marriage, divorce, legitimacy, adoption, and so on."

These writers clearly and consciously draw on comparative law, although Robertson³⁸ disapproves of "international principles of comparative law determining disputed characterizations."

It will be interesting to see what remains of the Bartin-Kahn theory after dealing with particular problems in the course of this book.

However, the "logical" argument has been overturned in a striking manner, thanks to the special refutations by Neuner³⁹ and, more recently, by Cook,⁴⁰ both pointing out

³⁵ NUSSBAUM, D. IPR. 48, 194, 288; NUSSBAUM, Principles 73.

³⁶ MAURY, 57 Recueil 1936 III 325 at 504.

³⁷ ROBERTSON, Characterization 91.

³⁸ ROBERTSON, Characterization 31, 189.

³⁹ NEUNER, Der Sinn, esp. 132; also "Policy Considerations in the Conflict of Laws," 20 Can. Bar Rev. (1942) 479 at 484.

⁴⁰ COOK, Legal Bases, esp. 214.

the mistake of seeking in internal law the concepts needed in conflicts law. The naïve argument they criticize attributes an absolute character to juridical concepts, irrespective of their purposes; it presupposes that the concepts of domicile, contract, capacity are identical in the laws of property, family, jurisdiction, taxation—and conflicts! Only the ancient “realism of concepts,” which had some force in Greco-Roman philosophy and a disputed role in Roman jurisprudence,⁴¹ and the *Begriffsjurisprudenz* of the nineteenth century, ridiculed in Jhering’s “Heaven of Concepts,” present equal errors. The relativity of legal concepts is a mere commonplace in all other departments of law.

The chief reason why the present writer started the attack against that theory and here stresses its utter unsoundness, is illuminated by the very title of Bartin’s paper, “On the impossibility of arriving at a definitive suppression of the conflicts of law.” Naturally, if each conflicts law is nothing but an annex to the corresponding internal law and receives its sense and meaning only from this national and local source, uniformity cannot be achieved, even though all conflicts laws should be unified, without simultaneous unification of all municipal laws. The temporarily complete victory of this idea has weighed heavily on hopes and endeavors to reform and unify the national bodies of private international law. Black pessimism resulted, and it is no wonder that the excesses of nationalism in our field were particularly serious in the writings of the many students who followed Kahn and Bartin. This gloomy outlook, unfortunately, is still shared by certain present writers.

As things now stand, few points respecting the writer’s opinion still seem to call for explanation. The most significant is the objection on *a priori* grounds that this comparative-

⁴¹ SOKOŁOWSKI, *Die Philosophie im Privatrecht* (2 vols., Halle, 1902-1907), and for criticism, RABEL, *Vierteljahrsschrift für Wissenschaftliche Philosophie und Soziologie*, 1904, 108.

analytical method, though representative of the future, is useless for existing law.⁴²

It has never been denied that the actual conflicts rules of the European codifications or those usually applied by Anglo-American courts originally had linguistic connections. The question is merely that of "freeing," "emancipating," these rules from their domestic background. Is this illicit? A few Italian writers say so; in their opinion, rules must be interpreted within the perspective of the legislator. But, even if this were true, do we have to assume that draftsmen of conflicts rules have been ignorant that foreign laws may differ in many respects from their own conceptions? In laying down the rule that wrongs are governed by the law of the place of wrong, do legislators not consider the possibility that an injury done abroad may constitute a wrong where committed, though not in the forum? Or are conflicts rules not supposed to be applied indifferently as respects all laws of civilized peoples? In fact, their compass is generally world-wide, and, in the absence of a universal language, they necessarily employ the "word-symbols" of the domestic vocabulary.

Again, whether rigid limitations on the interpretation of legal rules be inferred from the alleged intention of the legislator, as the Italian school seems to postulate, or from the principle of strict construction of statutory texts, often followed at common law, such restrictions are inconsistent with the methods of creative interpretation recognized in modern legal practice. Formalism is particularly misplaced in construing conflicts rules, the overwhelming majority of which are in an unsettled and formative stage throughout the world. Most are unwritten, and many of the written rules are vaguely

⁴² PACCHIONI, *Elementi* 182; FEDOZZI 190; DE CASTRO, 20 *Revista Der. Priv.* (1933) 240 at 247; FALCONBRIDGE, "Characterization in the Conflict of Laws," 53 *Law Q. Rev.* (1937) 235 at 245, followed by DAVIES, "Règles générales des conflits de lois," 62 *Recueil* 1937 IV 497; MAURY, 57 *Recueil* 1936 III 325 (definitely milder).

drafted and defectively constructed. As a matter of fact, the art of interpretation, a versatile and fecundating implement of modern private law, is not used with entire efficiency in our field. Clumsy constructions and half-hearted attempts at adjusting antiquated maxims or correcting inexact texts abound. Should progressive development from case to case and through systematic effort be barred, this stepchild of jurisprudence would be an orphan indeed.

Yet, in the case of many writers, one hand does not seem to know what the other is doing. While Ago is the most intransigent adversary of analytical comparison, he has selected from a hundred cases discussed in the literature, one, the simplest, to demonstrate with what perfect safety the *lex fori* theory operates.⁴³ This is the case. Under German and other laws, spouses may by settlement institute heirs to either of them. The Italian legislation does not expressly allow such appointment by contract of a successor upon death. How should an Italian judge consider such a settlement by German spouses? Ago agrees that the question is covered by the Italian conflicts rule concerning intestate succession and wills, although these two grounds of succession do not include settlements. German law therefore governs. But Ago declines to accept any extensive interpretation based on comparison of the three grounds of inheritance involved. He takes the application of the conflicts rule respecting inheritance for granted, because the Italian inheritance law, tacitly excluding settlements respecting succession at death, implicitly classifies them as grounds of succession. By chance, the question came up in the French Court of Cassation.⁴⁴ A prenuptial settlement concluded in France by Italian nationals contained a stipulation by the wife, leaving at death the unrestricted portion of her

⁴³ AGO, 58 Recueil 1936 IV 247 at 333.

⁴⁴ Cass. (req.) (May 7, 1924) Revue 1924, 406, Clunet 1925, 126. The French law of the situs was likewise applied to a settlement of Spanish spouses, Cass. (civ.) (April 2, 1884) Clunet 1885, 76.

estate, including a French immovable, to the husband. It was pleaded that the settlement was void under Italian law, since it contemplated a donation of future acquisitions. The court held the gift valid under the *lex situs*, viz., the French provision allowing devise by prenuptial settlement, thus emphasizing the contractual aspects of the transaction. Niboyet apparently conceives that, while the French court proceeded on the basis of the law of succession, an Italian court would have held the gift invalid specifically on the ground of the conflicts rule concerning matrimonial property.⁴⁵ However all this may be, since the Italian Code does not recognize such agreements either in the chapter on matrimonial property or in defining grounds of succession, the characterization cannot be inferred from these chapters. Unconsciously, Ago did assimilate the foreign institution within the titles *mortis causa* on the basis of a comparison of legislations.

The process required for such interpretations, in fact, is necessarily of a comparative nature and has always been so recognized by thoughtful scholars.⁴⁶ Assuredly, the comparison has not always been comprehensive, systematic, and fully documented. But today, at least in civil law countries, it is no excuse to neglect comparative studies on the ground of unavailability of information. So much has been done in making the sources and literature accessible even in distant countries that the existence of gaps should be an incentive rather than a deterrent for scholars able to collaborate. So far as interstate conflicts go, the studies in this country are the most prominent example of continuous consideration of some fifty internal laws. Never has comparative law been more thoroughly utilized than in this country, and never so much uniformity achieved.

⁴⁵ See NIBOYET 503 no. 417.

⁴⁶ See for instance KAHN, 1 Abhandl. 315, 491; 2 Abhandl. 18.

It has been objected, nevertheless, that a scientific approach to conflicts law by comparative critique is precluded by the defective conditions of comparative research and that conclusions will be arbitrarily subjective. Such an assertion indicates lack of personal experience in such work. The common law is a living refutation. In civil law countries, no serious student of conflicts law has failed to consider neighboring legislations. Moreover, comparisons between the common law and the civil law were undertaken by Story in America in 1834 and by Bar in Europe in 1862 with patent success. To bridge the gulf between these two halves of the legal world is the task of the present generation of lawyers. Hidden behind apparent dissimilarity, there are fundamental likenesses, suggesting international cooperation, though of course not necessarily unification.

No doubt, existing comparisons of the kind required in the field of conflicts of laws are of recent date and far from exhaustive.⁴⁷ General concepts, which may be used universally, are being built up but slowly. However, a great deal of knowledge has been attained, and to gain more is within the capacity of modern science. Researchers to a variable extent are of course engrossed in the legal culture in which they have been educated.⁴⁸ A lawyer is apt to state more accurately and to give preference to the conceptions of his system over foreign ideas. However, with increasing international collaboration in comparative work, the qualities of the different scholars will compensate for each other, and the multiplicity of views in the world will provide a rich variety of outlooks. In any case, an imperfect attempt to do justice to foreign institutions

⁴⁷ The following are not new admissions by the writer. See RABEL, 3 *Z.ausl. PR.* (1929) 756; 5 *Z.ausl. PR.* (1931) 287, *Revue* 1933, 1 at 61.

⁴⁸ RABEL, 3 *Z.ausl. PR.* (1929) 756; BECKETT, "The Question of Classification ('Qualification') in Private International Law," 15 *Brit. Year Book Int. Law* (1934) 46 at 59.

is superior to any technique which ignores them. Judges are fully entitled to limit their inquiries to the two or three laws primarily influencing a case in which legal science has done nothing to help.⁴⁹ Instinctively this is what the courts do.

With respect to the narrower subject of characterization, expediency alone is decisive. It may be that categories as defined by internal law have a role to play in such subjects as jurisdiction, procedure, taxation, etc., but ordinarily not in the case of conflicts rules. For conflicts law, characterization according to the law declared applicable in the conflicts rule also is by no means excluded, but only for special situations. Martin Wolff was perhaps inspired by the problems of marital property with which he first happened to deal, to suggest this method of characterization. In principle, a private law term used in a conflicts rule means what is common to the various institutions of the national laws serving the same legislative purpose.

It is not even true that the so-called connecting factors should always be understood as defined by domestic law. Domicil cannot be so simply treated. Nationality is exclusively defined by the state whose national an individual is claimed to be. The place of contracting in negotiations between absent parties is not to be determined by the law of the forum alone, at least if under this law the place is found to be situated abroad, *et cetera*.

IV. THE SECOND PART: REFERENCE TO A LEGAL SYSTEM

1. The Nature of the Reference

While American students of conflicts law but recently have begun to discuss other general problems, as a rule they have been interested in the controversy regarding the *locus standi* of foreign law in court.

⁴⁹ RABEL, 5 Z.ausl.PR. (1931) 267, Revue 1933, 1 at 37.

The doctrine of territorialism initiated by d'Argentré and perfected by Huber is predicated upon Huber's first axiom that the laws of a state have force only within the territorial limits of its sovereignty. This tenet, adopted in the American cases, was solemnly formulated by Story, Dicey, and Beale.⁵⁰ The first section of the Restatement reproduces it literally:

"no state can make a law which by its own force is operative in another state; the only law in force in the sovereign state is its own law . . ."

"Law" in this connection means internal law, and the contention therefore is that foreign internal law has no "force," even though invoked by a conflicts rule. The flagrant inconsistency of this thesis with actual needs and practices was initially relieved by Huber's invention of "*comitas gentium*" and, after this shallow idea had finally exploded,⁵¹ by Dicey's and Beale's attempt to reanimate the theory of vested rights.⁵² Hence the Restatement, section 1, continues:

"... but by the law of each state rights or other interests in that state may, in certain cases, depend upon the law in force in some other state or states."

This theory has also been employed in modern France by Pillet and Niboyet⁵³ on the background of conceptions eminently hostile to the application of foreign law. However, both the Anglo-American and the French theories of acquired rights have been critically destroyed,⁵⁴ together with that of neoterritorialism.⁵⁵

⁵⁰ STORY §§ 18 ff., DICEY 9; 1 BEALE 52.

⁵¹ DICEY 8; 1 BEALE 53; GOODRICH 7; LORENZEN, 6 *Répert.* 282 nos. 29, 30.

⁵² DICEY 58; BEALE, 3 *Cases on the Conflict of Laws* (1902) §§ 1-5; 3 *Treatise* 1968; CHESHIRE (ed. 1) 3, revoked in ed. 2, 86.

⁵³ VAREILLES-SOMMIÈRES V ff., XXXIV ff.; PILLET, *Principes* 495-571; NIBOYET, 5 *Répert.* 708 to 725.

⁵⁴ United States: COOK, "The Logical and Legal Bases of the Conflict of Laws," 33 *Yale L. J.* (1924) 457, *Legal Bases* 1; LORENZEN, "Territoriality, Public Policy and the Conflict of Laws," 33 *Yale L. J.* (1924) 736; YNTEMA, "The Hornbook Methods and the Conflict of Laws," 37 *Yale L. J.* (1928) 468; HEILMANN, "Judicial Method and Economic Objectives in Conflict of Laws,"

The Italian writers think, nevertheless, that the phenomenon of the application of a law created by a foreign state still presents a problem, and on independent grounds eminent critics of Beale's theory in this country think the same. In the opinion once proposed and then revoked by Anzilotti, which has been perpetuated by others, a foreign rule cannot be applied unless it has been appropriated by the state of the forum and transformed into a domestic rule.⁵⁶

This theory of "material reception" of foreign law supposes an untenable fiction. Nobody really believes that Norwegian marriage law is made the law of Oklahoma, just for the purpose of deciding in Oklahoma whether the parties years ago celebrated a valid marriage in Oslo. Where one party sues for annulment, a Norwegian enactment intervening in the meantime and modifying the conditions of annullability of previous marriages, is applicable,⁵⁷ clearly because the Norwegian law and not that of the forum governs.

Another opinion is that the foreign rule is adopted by "formal reception" only; the conflicts rule is construed as implying that the foreign rule is inserted into the body of the

43 Yale L. J. (1934) 1082; STUMBERG, "Conflict of Laws. Foreign Created Rights," 8 Texas L. Rev. (1930) 173 and STUMBERG 9.

France and Belgium: ARMINJON, 1 Précis 271 and ARMINJON, "La notion des droits acquis en droit international privé," 44 Recueil 1933 II 5 esp. at 59; J. DONNEDIEU DE VABRES 754; WIGNY, "La théorie des droits acquis d'après Antoine Pillet," 58 Revue Dr. Int. (Bruxelles) (1931) 341 and WIGNY, Essai 159.

Germany: HORST MÜLLER, Der Grundsatz des wohlverworbenen Rechts im internationalen Privatrecht, Hamburger Rechtstudien Heft 26 (1935), authoritatively reviewed by GUTZWILLER, 10 Z.ausl.PR. (1936) 1056.

⁵⁵ All European writers have protested against the principle of territorialism. See for instance NIBOYET, 604, stating that the French courts, for some time immediately after the Code came into force, were perhaps impressed by the memory of the former strict territorialism of the statutists, but actually rejected this nefarious principle.

⁵⁶ ANZILOTTI, Studi critici di diritto internazionale privato, parte II (1898); PACCHIONI, Elementi 137; *Contra*: FEDOZZI 162: "artificial," "a phantom of studio"; MAURY, 57 Recueil 1936 III 325 at 382.

⁵⁷ BARTIN, 1 Principes 298.

domestic law of the forum but with the significance and value it has under the foreign system.⁵⁸

The "local law theory" as developed in this country is kindred to these conceptions, presumably more closely to the idea of "formal" reception. It differs in the thesis peculiar to this country that the judge creates the law according either to his own or to foreign legal rules as the case may require. But, for conflicts law more than any other branch of national law, law must exist before and outside of lawsuits.

After all, why can the foreign rule not simply come into court without crutches? Is it not sufficient that the court's own conflicts rule orders application? Once more, the full power of conflicts rules seems to be greatly underestimated. On the other hand, no kind of domestication invests a foreign rule with exactly the same power that domestic rules have. For example, the maxim *jura novit curia* is usually not extended to foreign law.⁵⁹ The dominant opinion in Europe⁶⁰ as well as in this country⁶¹ has entirely discounted the remnants of the doctrine inherited from Ulric Huber; there is no longer any problem.

2. The Extent of the Reference

The theory of Bartin, Kahn, and their followers purports not only to determine the content of the first part of the conflicts rule but also that of the second part; not only should

⁵⁸ ANZILOTTI, *Corso di diritto internazionale* (Roma, 1923) 75; GHIRARDINI, "Sull'interpretazione del diritto internazionale privato," 13 *Rivista* (1919) 290; PERASSI, "Su l'estensione del diritto internazionale privato italiano alle nuove Provincie," *Rivista* 1926, 518; BALDONI, *La successione nel tempo delle norme di diritto internazionale privato* (Roma, 1932) 9; AGO, 58 *Recueil* 1936 IV 247; BOSCO 95; also MAURY, 57 *Recueil* 1936 III 325 at 386.

⁵⁹ BARTIN, 1 *Principes* 295.

⁶⁰ PILLET, 1 *Traité* no. 51; BARTIN, 1 *Principes* 20 § 10; LEREBOURS-PIGEONNIÈRE no. 216; RAAPE 12; CAVAGLIERI, *Revue* 1930, 397, 405.

⁶¹ CAVERS, "A Critique of the Choice-of-Law Problem," 47 *Harv. L. Rev.* (1933) 173, 177, thinks that the majority of voices is contrary to the local law theory.

the matters referred to a foreign law be selected according to domestic conceptions, but also the foreign rules to which these matters are referred must accord with the domestic system. Consequently, within the limits of a conflicts rule respecting "torts," foreign substantive rules concerning what in the eyes of the forum would be "quasi-contract" are inapplicable.

An example of this kind of argumentation is furnished by the well-known English decisions relating to the statute of limitations. In the leading case of *Huber v. Steiner*,⁶² Tindall, C. J., refused to apply the French rule of prescription to a French promissory note. He declared the French rule procedural, on the ground of Story's test that a limitation imposed on enforcement only rather than upon the right is procedural in character. German law has been treated in the same way in the English courts.⁶³ Actually, the undisputed German conception and the dominant French opinion is that a limitation bars the action only and the right survives. This does not mean that a limitation is procedural; it is substantive in the precise sense here relevant, namely, that it provides the debtor an exception to his obligation, a material right of defense.⁶⁴ Consequently, the French and German courts characterize statutes of limitations as substantive for the purposes of conflicts law. Modern English writers agree that the English cases are wrong; they deprive the debtor of a defense because of the accidental forum.⁶⁵ The American decisions in cases

⁶² 2 Bing. N. C. 202 (C. P. 1835).

⁶³ *Société Anonyme Metallurgique de Prayson v. Koppel*, *The Times*, November 2, 1933, 77 *Solicitor's Journal* (1933) 800 cited by BECKETT, 15 *Brit. Year Book Int. Law* (1934) 75, *supra* n. 48.

⁶⁴ This alone is relevant. Neither BECKETT, 15 *Brit. Year Book Int. Law* (1934) 46 at 75, *supra* n. 48, nor ROBERTSON, *Characterization* 248, 251, have reported correctly on the Continental law.

⁶⁵ BECKETT, 15 *Brit. Year Book Int. Law* (1934) 75 ff., *supra* n. 48; CHESHIRE 38, 42; MENDELSSOHN BARTHOLDY, "Delimitation of Right and Remedy," 16 *Brit. Year Book Int. Law* (1935) 20 at 41; ROBERTSON, *Characterization* 64; CORMACK, "Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws," 14 *So. Cal. L. Rev.* (1941) 221 at 234.

where the courts do not feel bound by the early doctrine, give effect to foreign statutes of limitations.⁶⁶

While Kahn corrected his doctrine by suggesting some latitude in recognizing foreign rules as applicable but protested against the application of foreign law in its totality,⁶⁷ recently Bartin has radically restricted the scope of his theory.⁶⁸ He has done so, following an argumentation usual in Italy, namely, that, in the first instance, the *lex fori*, being the legal order in which the conflicts rule originates, prescribes the characterization to be adopted, but that, the applicable law having been selected, it must be applied with its attendant interpretation.⁶⁹ In other words, characterization by the *lex fori* for choice of law—characterization by the foreign law once chosen. This reasoning has found favor with several Anglo-American writers under the name of “secondary characterization,”⁷⁰ but seemingly they do not agree with each other on numerous details.

This generous concession to common sense is welcome, but, due to its faulty origin in the *lex fori* theory, it is not broad enough and lacks a clear concept. For instance, it has been recently suggested⁷¹ that, if the object of a conflicts rule is “primarily” characterized as property, those foreign rules that

⁶⁶ See *Maki v. George R. Cooke Co.* (C.C.A. 6th, 1942) 124 F. (2d) 663, and Note, 9 U. of Chi. L. Rev. (1942) 723.

⁶⁷ KAHN, 1 Abhandl. 190.

⁶⁸ BARTIN, 1 Principes 231; 31 Recueil 1930 I 561, 603.

⁶⁹ ANZILOTTI, Corso di lezione (1918) 359 and Corso di diritto internazionale privato (1925) 79; CAVAGLIERI 104; PERASSI, Lezione di diritto internazionale, parte prima (1922) 78; UDINA, Elementi 51; AGO, Teoria 145; FEDOZZI 183; BOSCO 107. These authors, however, speak in a very fragmentary manner.

⁷⁰ CHESHIRE 37-45; UNGER, “The Place of Classification in Private International Law,” 19 Bell Yard (1937) 3 at 17; ROBERTSON, Characterization chs. v, 118 ff., and IX, 235 ff.; CORMACK, 14 So. Cal. L. Rev. (1941) 221 at 234, *supra* n. 65. *Contra*: RHEINSTEIN, Book Review, 8 Brooklyn L. Rev. (1938) 253 at 256; FALCONBRIDGE, “Renvoi, Characterization and Acquired Rights,” 17 Can. Bar Rev. (1939) 369 at 373; NUSSBAUM, Book Review, 40 Col. L. Rev. (1940) 1461, 1467.

⁷¹ CORMACK, 14 So. Cal. L. Rev. (1941) at 235 and n. 86, *supra* n. 65.

are considered property law in the foreign country should be applied. Yet, in a court in state X, why should a claim recognized by the domestic law of the forum (state X), on the theory that property is recoverable, not be sustained under the "applicable" law of Y, which regards the property as lost but provides recovery on some quasi-contractual or other theory? Or, to return to the statutes of limitations, the German Reichsgericht in a notorious early decision refused to apply the limitation statutes of Tennessee, whose law was considered controlling, because in America the defense was regarded as merely procedural.⁷² This refusal to apply a foreign provision because it is considered procedural in the foreign law, illustrates the theory of secondary characterization; it is evidently absurd.

Recently, the Reichsgericht discovered the correct solution long anticipated by many writers, namely, to apply the American statute.⁷³ The reasoning is, however, uncertain and partly based on the precarious ground that in German eyes the American remedy "also" possesses a "substantive" element justifying its application.

All such doubtful and complicated manipulations are unnecessary. The needs are simply and efficiently fulfilled by the application of the foreign law as it stands and, despite the admonition of Kahn, "in its totality."⁷⁴ If the first part of the conflicts rule, the description of the matter referred to the applicable law, is correctly formulated, i.e., not burdened by internationally impractical concepts, it contains in itself all that is necessary for its purpose. All else belongs to the selected system. In other words, the question which state's law governs the case, is answered by the choice of law; there is no reason

⁷² RG. (Jan. 4, 1882) 2 RGZ. 21.

⁷³ RG. (July 6, 1934) 145 RGZ. 121, IPRspr. 1934, no. 29, Revue Crit. 1935, 447.

⁷⁴ See the writer's detailed argument, 5 Zausl.PR. (1931) 273, Revue 1933, 1 at 44. No comparative law is needed for this purpose as certain critics have suspected.

why reference should not be made to this law as a whole instead of to parts prematurely chosen. (Whether some public policy of the forum is involved is entirely separate and independent.) More precisely, the court has to decide the question exactly as a court sitting in the foreign state would do, if such court had jurisdiction and had to apply its own domestic law.

CHAPTER 3

The Development of Conflicts Law

I. RETARDING FACTORS

1. Preconceptions

IT is gratifying that the majority of writers now advocate emancipation from deductive methods.¹ Past theories have left remainders too persistent, however, not to cause mischief. As a matter of course, and without reference to the desirability of doing so, the doctrine of territorialism has allocated broad fields to the law of the forum, including that of divorce and support, which is to be discussed in the present volume. There is still reluctance to attribute full legal effect to foreign acts and judgments in cases where the original power or jurisdiction of the foreign state is freely admitted, as is shown in the treatment of foreign adoption and foreign corporations.

Moreover, foreign law, though "applicable" under the appropriate conflicts rule, may nevertheless be rejected on the ground of "public policy" of the forum. Due formerly to the jealousy of small communities and princes, recently to chauvinism and worship of the state, this ground has abnormal significance.² Though for a long time French courts were

¹ See in particular ARMINJON, "L'objet et la méthode du droit international privé," 21 *Recueil* 1928 I 433, against deductive and for analytical method; LORENZEN, "Developments in the Conflict of Laws," 40 *Mich. L. Rev.* (1942) 781 at 805, "There is some indication that our courts are prepared to adopt a somewhat more realistic approach in conflicts situations. The immediate hopes for the further development of the conflict of laws in this country would seem to be in this direction."

² JUSTUS WILHELM HEDEMANN, former democrat, wrote in *Dt. Justiz* 1939, 1523: "Slowly the so-called private international law will take another aspect. It might be that the general clauses concerning public policy and reprisals (articles 30 and 31 of the Introductory Law) will overshadow everything else of

generally attacked because of their exaggeration of *ordre public*, European writers now tend to outdo them.

The increase of national feeling in Europe in the midst of the nineteenth century engendered Mancini's famous doctrine of nationality. The "principle of nationality," administered on a world-wide scale as Mancini insisted, would have been able to establish a balance in matters of personal status. But, excluded from the Anglo-American realm and from other countries, it created confusion on account of the claim of European states to govern the status and capacity of subjects who had emigrated to such countries. Moreover, as we shall see, the principle was repeatedly interpreted without sense of responsibility and reciprocity.

The doctrinal arguments generally adduced against such practical necessities as "renvoi" and the right of the parties to a contract to determine the applicable law are so significant that these two institutions deserve preliminary discussion immediately hereafter. Both have been rejected as incompatible with state sovereignty! The power of parties to choose their law by agreement was even declared "impossible," because there had to be first a substantive law allowing them such choice!

In a similar misuse of logic,³ it has been declared that the law governing the effects of a contract cannot "logically" control the extent to which error, fraud, or duress affects the consent of the parties—there must be a law to determine the validity of the transaction, before the law governing its effects can be selected. The law of the state of incorporation, or other law regulating the life of a corporation, has been said to be unable "logically" to determine the conditions of valid con-

the private international law." In the first World War, the Reichsgericht upheld firmly the conflicts rules, and the government in no serious respect interfered.

³ See on the following examples, RABEL, "Die Deutsche Rechtsprechung in einzelnen Lehren des internationalen Privatrechts, Vorbemerkung," 3 Z.ausl.PR. (1929) 752; WAHL, *ibid.* 791; KESSLER, *ibid.* 768.

stitution of the corporation. The settled rule that the law governing torts decides whether or not an act is a tort has been characterized as a "legal impossibility."⁴ Remembering the deduction of the clever Romanist, Mühlenbruch, that assignment of a chose in action is logically inadmissible, and similar errors of eminent jurists,⁵ we may derive consolation from the thought that time will provide a remedy.

In the United States, courts and writers are cognizant of such handicaps and are endeavoring to overcome them. Tradition and modernism are engaged in an interesting combat with varying results. Circumstances differ in the parts of this vast country. In respect to certain problems, it is difficult to state what American law actually is, as the Restaters have come to suspect. But the writers, practically without exception, and the great majority of the courts are seriously conscious of their duty to reach adequate solutions. When handbooks and notes in law reviews report on a subject, they usually present the forward trend of advanced courts in preference to formalistic decisions and precedents exaggerating local policy.

2. Renvoi

The controversy on "renvoi" is the most famous dispute in conflicts law,⁶ a classic example of violently prejudiced

⁴ This was the expression of 2 FRANKENSTEIN 363.

⁵ See RABEL, *Aufgabe und Notwendigkeit der Rechtsvergleichung*, Münchener Juristische Vorträge, edited by the Juristische Studiengesellschaft in München, Heft 1, reprinted from 13 Rhein. Z. f. Zivil- und Prozessrecht (1925).

⁶ Bibliography is to be found in POTU, *La question du renvoi en droit international privé* (1913); up to 1929 in LEWALD, "La théorie du renvoi," 29 *Recueil* 1929 IV 519; and in the footnotes by MAURY, "Règles générales des conflits de lois," 57 *Recueil* 1936 III 519 ff. On the history of the problem since a French case of 1652 see E. M. MEIJERS, "La question du renvoi," 38 *Bull. Inst. Int.* (1938) 191, 197.

Anglo-American literature in addition to the treatises: LORENZEN, "The Renvoi Theory and the Application of Foreign Law," 10 *Col. L. Rev.* (1910) 190, 327; same author, "The Renvoi Doctrine in the Conflict of Laws—Meaning of 'The Law of a Country,'" 27 *Yale L. J.* (1918) 509; *idem*, *Cases* (1932) 832-840; SCHREIBER, "The Doctrine of the Renvoi in Anglo-American Law,"

literature confronting naïvely consistent practice. Only where courts finally succumbed to the persuasion of world-wide learned criticism, did they falter, as in Greece, Italy, and in the isolated Tallmadge case in New York.⁷ On the other hand, the constancy of the French, German, and Swiss courts has been sufficient to impress their foremost Italian opponent,

31 Harv. L. Rev. (1918) 523; POLLACK, "The 'Renvoi' in New York," 36 Law Q. Rev. (1920) 91; ALLEMÈS, "The Problem of Renvoi in Private International Law," 12 Grotius Soc. (1927) 63; FALCONBRIDGE, "Renvoi and Succession to Movables," 46 Law Q. Rev. (1930) 465, 47 Law Q. Rev. (1931) at 271; also FALCONBRIDGE, "Renvoi et succession mobilière," in *Revue* 1932, 254, 451; FALCONBRIDGE, "Characterization in the Conflict of Laws," 53 Law Q. Rev. (1937) 559-567; FALCONBRIDGE, "Renvoi, Characterization and Acquired Rights," 17 Can. Bar Rev. (1939) 369 at 378; FALCONBRIDGE, "Renvoi and the Law of Domicile," 19 Can. Bar Rev. (1941) 311 to 317, 329 to 334; L. T. BATES, "Remission and Transmission in American Conflicts of Laws," 16 Cornell L. Q. (1931) 311; DICEY, Appendix, Note 1, 863 to 878; BENTWICH, "Recent Application of the Renvoi in Matters of Personal Status," 14 Can. Bar Rev. (1936) 379; MORRIS, "The Law of the Domicil," 18 Brit. Year Book Int. Law (1937) at 32; COWAN, "Renvoi Does Not Involve a Logical Fallacy," 87 U. of Pa. L. Rev. (1938) 34-39; GRISWOLD, "Renvoi Revisited," 51 Harv. L. Rev. (1937) 1165; CORMACK, "Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws," 14 So. Cal. L. Rev. (1941) at 249 to 275. See also LORENZEN, 6 Répert. 284 nos. 40-44, 353 no. 366; Decision Note, 2 Zausl.PR. (1928) 253; BENTWICH, "The Development of the Doctrine of Renvoi in England in Cases of Succession," 4 Zausl.PR. (1930) 433; BELLOT, "La théorie anglo-saxonne de conflits de lois," 3 Recueil 1924 II 99, 164 to 168; KUHN, "La conception du droit international privé d'après la doctrine et la pratique aux États-Unis," 22 Recueil 1928 I 186 at 270-272. On the English cases, see furthermore MELCHIOR 194 n. 2; ELKIN, "La doctrine du renvoi en droit anglais," Clunet 1934, 577; MENDELSSOHN-BARTHOLDY, *Renvoi in Modern English Law* (Oxford, 1937); GRASSETTI, "La dottrina del rinvio in diritto internazionale privato e la 'common law' anglo-americana," 26 Rivista (1934) 3-41, 233-261, 350; DE NOVA, Book Review of GRASSETTI, 12 Annuario Dir. Comp., parte prima (1937) 258; and DE NOVA, "Considerazioni sul rinvio in diritto inglese," 30 Rivista (1938) 388; RHEINSTEIN, Book Review, 12 Annuario Dir. Comp., parte prima (1937) 314 at 316.

⁷ *In re Tallmadge*, *In re Chadwick's Will* (Surrogate's Court, New York County, October, 1919) 109 N. Y. Misc. 696, 181 N. Y. Supp. 336. DÉAK, Book Review, 1 La. L. Rev. (1939) 642, at 644 n. 14, notes that the court misunderstood the French rule. On a dictum of Steinbrink J. in *Lann v. United Steel Works Corporation* (1938) 166 N. Y. Misc. 465, 1 N. Y. Supp. (2d) 951, "cavalierly" dismissing the problem of renvoi, see FREUTEL, "Exchange Control, Freezing Orders and the Conflict of Laws," 56 Harv. L. Rev. (1942) 30, at 42 ff.

Anzilotti,⁸ and recently their main French adversary, Niboyet.⁹

In the course of the debate, many wrong arguments, "logical" and "practical," were advanced on either side.¹⁰ Most of these have cancelled each other long since. According to the view shared by the writer and gaining favor in this country,¹¹ the entire problem is not to be taken in the lump and decided on a *a priori* reasoning. The various categories of cases merit individual consideration in the light of expediency. Hence, in the subsequent treatment of each particular subject, the prevailing opinions, and the chief countries concerned, will be stated. Here we have to deal only with the basic issue.¹²

Renvoi, translated as "remitting," "reference back," properly means that, when a conflicts rule of a state refers to the "law" of another state and the conflicts rule of the latter state directs the application of the former's own internal law, such law is applied. Thus, in a French court, succession upon death to the movables of an American citizen domiciled in France is governed by the "American law" but, the law of the domicil, i.e., French inheritance law, being applicable under

⁸ ANZILOTTI, formerly against renvoi, *Studi critici di diritto internazionale privato*, parte 3, 193, 300, elaborated a system approaching the ideas of the English judges, *Corso di diritto internazionale privato* (1925) 66, 77; *Decision Notes*, 12 *Rivista* (1918) 81, 288.

⁹ NIBOYET, *Decision Note*, *Revue Crit.* 1939, 474-476, now accepts renvoi as definitively adopted by the courts, moreover as convenient, but in addition also as a tribute to territorialism.

¹⁰ Surveys on these arguments in English: LORENZEN, "The Renvoi Doctrine in the Conflict of Laws—Meaning of 'The Law of a Country,'" 27 *Yale L. J.* (1918) 509; CORMACK, 14 *So. Cal. L. Rev.* (1941) 221 at 252 to 260, *supra* n. 6. Cf. in favor of renvoi: LEPAULLE, "Nature et méthode du droit international privé," *Clunet* 1936, 284, 296; *Conclusions of M. REY* in a French case of 1935, *Nouv. Revue* 1936, 114.

¹¹ GRISWOLD, 51 *Harv. L. Rev.* (1937), 1165 at 1184, *supra* n. 6. See also RAAPE, *D. IPR.* 41; LEREBOURS-PIGEONNIÈRE no. 260.

¹² The policy considerations involved in the following exposition were indicated by the present writer in "El fomento internacional del derecho privado," 18 *Revista Der. Priv.* (1931) 367; RABEL, 5 *Z. ausl. PR.* (1931) 281; RABEL, 7 *ibid.* (1933) 199 n. 1; RABEL, *Die Fachgebiete* 118; they are in essential agreement with the opinions of MELCHIOR and GRISWOLD, fundamental for German and American laws, respectively.

American principles of conflicts, this law is applied by the French courts.

When the principle of *renvoi* was first adopted in the *Forgo* case by the French Court of Cassation,¹³ the avowed motive was favor of the law of the forum, the law familiar to the court and appearing to him the most suitable. In that case, moreover, the French state had a material interest. The judgment gave the property of a deceased Bavarian citizen in the absence of heirs to the French exchequer rather than to that of Bavaria. This narrowmindedness is responsible for much of the ensuing heated attacks on the doctrine. Nevertheless, many courts applying *renvoi* exhibit a similar attitude, and some writers, as well as a few projects, recognize only the reference back to the law of the forum, in contrast to other forms of reference.¹⁴ However, *renvoi* ought not to be understood as a concession to judicial deficiencies or prejudices. It represents the idea that a rule of conflicts of country X, referring to the law of country Y, should not be pursued to the point where the court in X applies to an inheritance the law of Y, and a court in Y the law of X. Except under the influence of the learned literature, no normal judge would approve such a result. The theoretical accoutrements for this feeling have finally been furnished by a few modern writers. Reasonable interpretation of conflicts rules, often, if not normally, restricts the application of foreign substantive rules of law to the

¹³ Cass. (req.) (Feb. 22, 1882) Clunet 1883, 64; moreover, confirming the doctrine, Cass. (req.) (March 1, 1910) Clunet 1910, 888, the vote of the Counsellor Denis, published in Clunet 1912, 1013, declared: "J'aime mieux la loi française que la loi étrangère."

¹⁴ STAUB, Kommentar zum Handelsgesetzbuch, Anhang zu § 372 no. 5 (a); HÖLDER, 19 Z.int.R. (1909) 198; M. WOLFF, IPR. 49 (reference back as in the leading case); NUSSEBAUM, Principles 99.

The drafts of the new Italian preliminary provisions allowed only reference back and have been justly criticized as inconsistent by AGO, "Le norme di diritto internazionale privato nel progetto di codice civile," 23 Rivista (1931) 297 at 349, 350.

In Soviet Russia, reference back is considered to agree with the spirit of the law; see MAKAROV, Précis 123.

territorial limits defined by the respective foreign legal systems in their conflicts laws.¹⁵ Hence, the reference to the "law" of a foreign state may mean selection of the specific internal law that such state itself applies, and even an express reference to the internal law of a state may be conditional on its applicability by the state in question to the particular case.¹⁶

The opposite opinion, generally prevailing until recently, takes it for granted that a sound conflicts rule must necessarily refer to the material rules of some country and not leave the ultimate issue to foreign conflicts law. Why? One argument asserts that it is unworthy of a sovereign state to follow the commands of a foreign state.¹⁷ It appears that Italy, influenced by the intended universal significance of the Italian conflicts rules, has been won over by this argument.¹⁸ It seems most curious that Italy's dignity should be offended when Italian courts apply the Italian Civil Code instead of English case law. Another, the most popular argument, states that *renvoi* leads to a vicious circle. If the "acceptance" of *renvoi* from the (American) country of nationality to the (French) law of domicile is right, dominant opinion reasons, the same method must continue with *renvoi* from the French law of domicile to the American law of nationality. "Logical mirror," "international lawn tennis," "ping-pong," are celebrated names of the supposed *circulus inextricabilis*,¹⁹ time and again designated as the "most powerful argument" for rejecting

¹⁵ MELCHIOR 242-244.

¹⁶ RAAPE 741 and RAAPE, D.IPR. 42.

¹⁷ The argument was invented in France: LABBÉ, Clunet 1885, 5 at 9; VALÉRY 486 nos. 372, 374; PILLET, 1 Traité 532; BARTIN, 1 Principes 205, and many others.

¹⁸ See MELCHIOR 200; cf. 241. An entire book against the doctrine of the Italian courts has been published by PHILONENKO, La théorie du renvoi en droit comparé (Paris, 1935).

¹⁹ KAHN, 1 Abhandl. 20; LAINÉ, Clunet 1896, 241 at 257, 481; BARTIN, 30 Revue Dr. Int. (Bruxelles) (1898) 155; STREIT, 20 Recueil 1927 V 101; LEWALD 17 no. 22; *In re Tallmadge*, *In re Chadwick's Will* (Surrogate's Court, New York County, October, 1919) 109 N. Y. Misc. 696, 181 N. Y. Supp. 336.

renvoi.²⁰ By parity of reasoning, it has been supposed that an English or American court resorting to renvoi ought to accept renvoi from the French law of domicile to the American law of nationality, and so forth.

A striking, though tacit, answer has been provided by the English practice, more than a hundred years in development, in the very field where renvoi originated, viz., where nationality and domicile principles conflict. The practice enables the English courts to obtain results in harmony with the Continental decisions in specific situations and to avoid the *circulus*. Basically, confronted with the French and German renvoi practice, the English courts simply have given free play to their own principle of domicile. The estate of an English decedent domiciled in France is distributed under French law, both in French courts by renvoi and in English courts as the law of domicile.²¹ Put to the test when Italian courts repudiated renvoi, disdained to apply Italian inheritance law, and insisted on British law for British successions in Italy, the English judges exhibited real wisdom in avoiding the absurd result not of renvoi but of the rejection of renvoi. They realized that the traditional form of their domiciliary principle refers to the same law which is applied by the court of the domicile. Under the principle as now defined, the reference to the law of domicile points primarily to the conflicts law of the domicile. The cases use different language to express this policy of forbearance. Undue attention has been given to inconsistencies and to sayings such as that the English court should decide as if sitting at the place of the domicile.²²

²⁰ The "decisive argument" for innumerable writers and still so, for instance, for LEWALD, "La théorie du renvoi," 29 Recueil 1929 IV 519 at 545, 595; MEIJERS, "La question de renvoi," 38 Bull. Inst. Int. (1938) 191, 219. For this "powerful" reason, the Italian drafts limited renvoi to reference back, and the final text, C. C. (1938) Disp. Prel. art. 20, eliminated it entirely.

²¹ *In re Ross*, 1 Ch. D. [1930] 377, 388.

²² *Collier v. Rivaz*, 2 Curt. Ecc. Ct. (1841) 855, 863, per Jenner, J., often quoted, and adopted by DICEY in his early thesis that "the object of our courts is to deal with such a will exactly as the courts of the domicile would deal with

In fact, several modes of stating renvoi are thinkable and have been employed by writers, courts on the Continent, and British judges. Falconbridge lucidly distinguishes three kinds of renvoi,²³ and some authors, who have contrived an intricate system of distinctions, call the English method "double renvoi." But these details do not touch the essential point, namely, the policy behind the cases. The writers who seem not to have understood this policy—unfortunately there are many—may be excused, since even Luxmoore, J., in *In re Ross*²⁴ and Lord Maugham, in *In re Askew*,²⁵ while confirming and fortifying the rule, evidently regretted that the precedents had abandoned the pure domiciliary test. The English rule is a praiseworthy contribution to international harmony, not difficult to derive from the principle of domicil. It was prepared by the historic doctrine that jurisdiction implies application of the law of the court.²⁶ Finally, these principles have been illuminated by the Privy Council in a recent case²⁷ "with all the weight of a considered judgment devoted to the issue" of renvoi in general.²⁸ The reference from the *lex situs* to the national law in the Palestinian Succession Ordinance,

it." DICEY, *The Law of Domicile, as a Branch of the Law of England* (London, 1879) 295.

The differences of language and certain errors in the decisions were subjected to a meticulous criticism by MENDELSSOHN-BARTHOLDY, *Renvoi in Modern English Law*, followed widely by CHESHIRE (ed. 2) 44-67, in an unfortunate contrast to his former view, "Private International Law," 51 *Law Q. Rev.* (1935) 76 at 77, (CHESHIRE, ed. 1, 135-139). Both authors, in the spell of the formalistic international theories, failed to appreciate sufficiently the policy questions. The same is true of the subtle criticism by MORRIS, 18 *Brit. Year Book Int. Law* (1937) at 32, *supra* n. 6. See GRISWOLD, 51 *Harv.L.Rev.* (1938) at 1172, *supra* n. 6, and his *Book Review*, 51 *Harv.L.Rev.* (1938) 573.

²³ FALCONBRIDGE, "Renvoi, Characterization and Acquired Rights," 17 *Can. Bar Rev.* (1939) 369 at 378.

²⁴ *In re Ross*, 1 Ch. D. [1930] 377.

²⁵ *In re Askew*, 2 Ch. D. [1930] 259.

²⁶ See the interesting discussion by MORRIS, 18 *Brit. Year Book Int. Law* (1937) at 32, *supra* n. 6; RHEINSTEIN, 12 *Annuario Dir. Comp.* (1937) 315 ff. KUHN, *Comp. Com.* 52; DE NOVA, "Considerazioni sul rinvio in diritto inglese," 30 *Rivista* 1938, 388 at 412-415.

²⁷ *Jaber Elias Kotia v. Katr Bint Jiryes Nahas* [1941] 3 All E.R. 20, per Clauson, L. J., the Judicial Committee (including Lords Atkin, Russel of Killowen, Romer and Sir George Rankin).

²⁸ KEITH, "The Privy Council on Renvoi," *Journ. Comp. Leg.* (1942) 69.

1923, of a deceased owner is construed as pointing to the law which the courts of the national country would apply to the property in question, as distinguished from property in their own country, the contrary construction being regarded as "deliberately cutting across the principle"²⁹ recognized by the English courts.

What, then, of the mirror cabinet? If the world is split into two contradictory systems, there must be some *modus vivendi*. Renvoi is one of the best means to this end. It stands to reason that it cannot be applied in the *same* manner by the two antagonistic groups and at the same time reach conformity.³⁰ The English method, in turn, is not to be observed by courts following the nationality principle! Theorists should not demand schematic symmetry just to obtain an *argumentum ad absurdum*. This understood, it need no longer be feared that the English attitude will create new cases of *circulus inextricabilis*.³¹ The difference between nationality and domicile as tests of personal law requires a *different* technique in each

²⁹ [1941] 3 All E.R. at 25.

³⁰ The view of the English courts has a striking parallel in an equally wise old decision of the Appeal Court of Lübeck, of March 21, 1861, Krebs v. Rosalino, 14 Seuff. Arch. 644 no. 107. The case was entirely analogous to the Annesley case [1926] Ch. 692. The testatrix, a subject of Frankfurt on the Main, according to the normal concept of domicile, had her last domicile in Mainz, but, as she did not have the governmental authorization for domicile according to the French Civil Code in force in Mainz, she lacked domicile there in the meaning of the law of Mainz, quite as Mrs. Annesley did under French law. The conflicts rule of Mainz was uncertain; possibly it subjected succession to movables to the law of nationality of the deceased, i.e., the statute of Frankfurt. The Court of Lübeck, under its own conflicts rule, referring the succession to the domicile of the *de cuius*, declared that correct application of the principle required that the entire law of the testator's domicile in its totality be applied and succession upon death be adjudicated as in the courts of the domicile.

In his recent work, LEWALD, *Règles générales des conflits de lois* (1941) 49, 56, again insists that thus the Court of Lübeck refers from domicile to nationality, while the Forgo case and all its followers refer from nationality to domicile. But why should this contrast which involves no contradiction, be cited as a reproach to the renvoi principle, rather than to the diversity of conflicts principles and of concepts of domicile?

³¹ This is feared by MORRIS, "The Law of Domicil," 18 Brit. Year Book Int. Law (1937) 32, 37; CHESHIRE 65; MAURY, 57 Recueil 1936 III 329, 538; DE NOVA 441; CORMACK, 14 So. Cal. L. Rev. (1941) 221 at 272, *supra* n. 6; NUSSBAUM, "Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws," 42 Col. L. Rev. (1942) 189, 202, and Principles 98.

group of countries. Indeed, the nationality principle does not mean that a foreign national is subject necessarily to the substantive law of his country; it means that the state to which the individual belongs should determine his personal relations. The law of domicile does not mean that everybody must be subject to the substantive law of his domicile. The reasonable construction is that the law of the place of domicile determines what law should govern. Instead of following writers³² who with a certain pride declare that they intend to "explain away" the English conception of renvoi, the English model should be extended to other types of cases and to other countries in accordance with the spirit of the principles guiding the forum.

As to such types of cases, the German³³ courts have consistently assumed that reference back must be accompanied by the acceptance of reference to a third law (*Weiterverweisung*, transmission).³⁴ In the case of an English testator domiciled in Germany who leaves immovables in Georgia (U.S.A.), the German rule refers to English conflicts law which refers to the *lex situs*. The statute of distribution of Georgia, therefore, is applicable in a German court as well as in England, although German conflicts law itself does not distinguish immovables for the purpose of succession. The persistent objections to this extension of the renvoi principle chiefly tend to demonstrate that the chain of references may lead nowhere, a fear not justified by any noteworthy case material³⁵ and not significant in view of the standard set by the English precedents. There must always be some hierarchy in the applicable laws. Renvoi is not just an aimless game.

³² MORRIS, MENDELSSOHN-BARTHOLDY, CHESHIRE and others.

³³ More doubt exists with respect to French courts, but transmissive reference is recognized by Cass. (req.) (Nov. 7, 1933), *Guez c. Ben Attar*, Clunet 1935, 88, *Revue Crit.* 1934, 440.

³⁴ For this translation see SCHREIBER, "The Doctrine of the Renvoi in Anglo-American Law," 31 *Harv. L. Rev.* (1918) 523.

³⁵ See NUSSBAUM, 42 *Col. L. Rev.* (1942) 202, *supra* n. 31.

*Illustrations:*³⁶ (a) A Danish national dies domiciled in Rome, Italy, leaving movables in Germany. A German court will consult the national "law," i.e., the Danish conflicts law, which refers to the domicile and allegedly does not recognize renvoi. Therefore, the Italian statute of distribution is applied. It does not matter that Italian conflicts law equally refuses renvoi so that an Italian court under its nationality principle would apply the Danish inheritance law. Hence a German judge can without difficulty apply *Weiterverweisung* in this case, although the two foreign conflicts laws involved, the Danish and the Italian, do not agree with each other.

(b) A United States citizen domiciled in Rome leaves at death movables in Poland. The inheritance law of Italy is not applicable in any one of the three countries. An Italian court would apply "American"³⁷ inheritance law. An American court, were it to adopt the English renvoi practice, would give effect to the inheritance law of an American state. A Polish court, on the basis of the nationality principle and renvoi, should reach the same result.

(c) An Argentinian domiciled in Rio de Janeiro dies leaving movables in France. The French court is referred by its conflicts rule to the Argentine principle of domicile, and thereby to the conflicts rule of Brazil. Until recently, Brazilian conflicts law "accepted" the Argentine "renvoi," and Brazilian inheritance law was applicable in Buenos Aires as well as in Rio de Janeiro.

The present Brazilian Introductory Law of 1942, adopting the domicile principle, leads to the same result. The circumstance that the two internal laws are not in disaccord is not material in a French court, which simply follows the decision that the national (Argentine) court would render.

In the only decision on renvoi since the five former highest tribunals of Italy were replaced by the present Supreme Court,

³⁶ The first example is solved by MELCHIOR 225 § 151, as in the text, while WOLFF, IPR. 50 (2), uses the first and third examples in order to show that renvoi to a third law should not be followed, if the two foreign laws involved disagree in the choice of law. The case on which they agree is often excepted from the doctrinal refusal of renvoi.

³⁷ Which state's law? See *infra* pp. 128ff.

the advantages of "transmission" or reference over, as distinguished from reference back, are recognized.³⁸ This case, decided in 1937, is regarded as spectacular, since it is contrary to the settled practice of other courts, to the great majority of writers, as well as to the formal prohibition of *renvoi* expressed in the new Italian Code, then soon to enter into force.³⁹

While some authors accept only reference back⁴⁰ and others solely reference over,⁴¹ an increasing number advocate *renvoi* in either form for situations in which the same law is indicated by the conflicts rules of two or more foreign countries principally involved.⁴² For instance, in case two Swiss nationals, uncle and niece, whose intermarriage is prohibited by Swiss law, were to marry in Soviet Russia while there domiciled, the marriage would be valid according to both Russian law and Swiss conflicts law.⁴³ Presumably, it is admitted, the validity of the marriage would be recognized by any court.⁴⁴ Again, by the admission, the existence of a preconception is at least partially avowed.

In addition to references from the national law to the domiciliary law, others from the law of situs to the national or domiciliary law and *vice versa*, and in the field of obligations, have been admitted with good justification. The particular situations need separate consideration.

Ordinary *renvoi* is not able to settle a "positive" conflict of conflicts rules. Where a Spaniard dies domiciled in the United States, his movables are distributed here under the statute of

³⁸ Cass. Ital. (Dec. 29, 1937) 9 Rivista Dir. Priv. (1939) II 228.

³⁹ See GRASSETTI, Note to the decision *supra* n. 38.

⁴⁰ See *supra* n. 14.

⁴¹ The sovereignty of the forum is said not to be involved; BATE, Notes on the Doctrine of Renvoi (1904) 112 ff.; also, Austrian OGH. (May 2, 1929) JW. 1931, 166 (for obscure reasons).

⁴² LEWALD, 29 Recueil 1929 IV 519 at 574; MAURY, 57 Recueil 1936 III 329 at 549.

⁴³ Example adduced by RAAPE, 24, 745, as support for *renvoi* in general.

⁴⁴ LEWALD, Règles générales des conflits de lois (1941) 58.

the domicile and in Spain under Spanish inheritance law. This thorny problem is best covered by bilateral treaties. Or it may be obviated by extraordinary concessions, as in the Swiss statute on conflicts. In an admirable effort to avoid collisions regarding Swiss nationals abroad, the statute provides that Swiss citizens should be subject to Swiss municipal law only if the law of the domicile so prescribes; where the local domestic law of the domicile claims to govern or where the local conflicts rule remits the case to a third state's law, Switzerland conforms.⁴⁵ Hence, the national law extends to Swiss nationals abroad only under certain conditions.

At present, *renvoi* is prescribed by statutory provisions in Germany, Poland, Sweden, Hungary, China, Japan, Liechtenstein, and Palestine,⁴⁶ moreover by the Hague Convention on Marriage,⁴⁷ and the Geneva conventions concerning negotiable instruments.⁴⁸ In practice, it occurs beyond the limits of these provisions⁴⁹ and in other countries.⁵⁰ Under the influence of the theoretical literature, the recent codes of Italy,

⁴⁵ NAG. arts. 28, 31.

⁴⁶ Germany: EG. art. 27, in five cases of status questions.

Poland: Law of 1926 on private international law, art. 36.

Sweden: Int. Fam. L. of 1904 with subsequent amendments, c. 1 § 2, c. 2. § 1.

Hungary: Marriage Law of 1894, § 108.

Japan: Law of 1898, art. 29; China: Law of 1918, art. 4.

Liechtenstein: P.G.R. art. 45; S.R. art. 13 par. 2; see also for another provision WAHLE, 2 Zausl.PR. (1928) 137.

Palestine: Palestine Order in Council, Sept. 1, 1922, art. 64 (2).

Cf. cases commented by WENGLER, "Internationales und interreligiöses Privatrecht in Palästina," 12 Zausl.PR. (1939) 772, 790.

⁴⁷ Art. 1.

⁴⁸ Resolutions of the Hague (1912) concerning checks, art. 32, similar provision in Soviet Russia: Law on checks, of Nov. 6, 1929, art. 36. Cf. MAKAROV, Précis 191. Geneva conflicts rules on bills of exchange (1930) art. 2 par. 1.

⁴⁹ The German Supreme Court especially applies the principle of *renvoi* to all matters of conflicts law. See MELCHIOR 207 § 139.

⁵⁰ MELCHIOR 198, mentions Argentina (*contra*: VICO no. 304), Brazil (but see note 52 *infra*), Belgium, Bulgaria, Luxemburg, Norway, Portugal, Spain (doubting, LASALA LLANAS 246 ff.), Rumania, and Venezuela. To be added are certainly Switzerland and probably many other countries. See also Anglo-German Mixed Tribunals (May 31, 1926) 6 Recueil des décisions des tribunaux arbitraux mixtes 540.

Greece, and Rumania⁵¹ have rejected renvoi, as does the Brazilian law of 1942,⁵² while at the same time reducing conflicts by its acceptance of the domiciliary principle. But in the Continental literature, the traditional hostility of the writers is being abandoned.⁵³ In 1932, the Institute of International Law, which had censured renvoi in 1895, 1898, and 1900, recognized the conventional, legislative, and judicial trend, manifesting itself in various countries in certain applications of the renvoi doctrine, particularly with respect to personal status.⁵⁴

A like change of mind is to be hoped for the United States. The usual case for resort to renvoi is here almost without significance, as, in common with almost the entire British Empire, none of the States accept the principle of nationality. This evidently is the reason why the basic need has not been felt as in Europe. Other conflicts, however, have occurred, striking enough to compel the Restaters to admit some exceptions to their rejection of renvoi.⁵⁵ Cowan proves that renvoi is "logically" possible,⁵⁶ and Griswold vigorously pleads for

⁵¹ Ital. C. C. (1942) Disp. Prel. art. 30.

Greek C. C. (1940) art. 36.

Rumanian Draft art. LXIII (probably unchanged in C. C. 1940).

Also, one Belgian decision followed the pleading of Mr. van Hille against renvoi, see VAN HILLE, 66 *Revue Dr. Int. (Bruxelles)* (1939) 764.

The Dutch decisions are few and divided; see MEIJERS, "La question du renvoi," 38 *Bull. Inst. Int.* (1938) 191 at 204 n. 5; HIJMAN 153.

⁵² Brazil, Lei de Introdução, of Sept. 4, 1942, art. 16.

⁵³ France: in addition to older writers (WEISS, VAREILLES-SOMMIÈRE, COLIN), LEREBOURS-PIGEONNIÈRE, "Observations sur la question du renvoi," 51 *Clunet* 1924, 877; ARMINJON, "Le renvoi," *Revue* 1922-1923, 565 at 583 ff.

Belgium: ROLIN, POULLET.

Germany: NUSSBAUM, M. WOLFF, in addition to the older writers recorded by MELCHIOR 201 § 137.

Italy: ANZILOTTI.

Spain: TRÍAS DE BES, "Règles générales des conflits de lois," 62 *Recueil* 1937 IV 62.

⁵⁴ *Annuaire* 1932, 471.

⁵⁵ *Restatement* § 8.

⁵⁶ COWAN, "Renvoi Does Not Involve a Logical Fallacy," 87 *U. of Pa. L. Rev.* (1938) 34-49.

renvoi wherever no special reasons militate against it.⁵⁷ Even from an opposed point of view, Cormack, in effect, accepts the practical result of renvoi in all cases respecting status and property, since he would determine these matters according to the law considered applicable at the domicile or situs respectively.⁵⁸ It would accordingly seem that the critic who declared his appreciation for Griswold's advocacy of a cause lost before the formidable array of the enemies of renvoi,⁵⁹ may soon have to look for another ground of sympathy.

3. Choice of Law by the Parties ⁶⁰

The doctrine of "autonomy of the parties" is also to be noted in this connection as an example of obstinate theory opposed to universal practice. The details will be considered later in connection with contracts.

The practice allowing parties to a contract to determine the law applicable to their contractual relation, recognized in Dumoulin's theory, for centuries has been applied by courts throughout the world with slight dissent.⁶¹ In commercial arbitration, this right of the parties is taken for granted. If this time-honored view has recently suffered vacillation, it is due to the fanatical campaign of the handbooks in the last decades. After World War I, the Mixed Arbitral Tribunals,

⁵⁷ GRISWOLD, "Renvoi Revisited," 51 Harv. L. Rev. (1937) 1165.

⁵⁸ CORMACK, 14 So. Cal. L. Rev. (1941) 221 at 229, *supra* n. 6; *contra* FALCONBRIDGE, "Renvoi and the Law of the Domicile," 19 Can. Bar Rev. (1941) 311 at 335, 337.

⁵⁹ Annual Survey of English Law 1938, 388.

⁶⁰ An excellent comparative study on the subject is the book by H. BATIFFOL, *Les conflits de lois en matière de contrats* (1938).

⁶¹ The Swiss Federal Court holds that the questions connected with the formation of a contract, such as those concerning consent, fraud, error, formalities, power of attorney, are inaccessible to the parties' choice of law; it seems that these questions are determined, preferably at least, under the law of the place of contracting. See BG. (Nov. 7, 1933) 59 BGE. II 397, 399; BG. (July 12, 1938) 64 BGE. II 346, 349; NIEDERER, "Die Parteiautonomie in der neuen Praxis des Bundesgerichtes auf dem Gebiete des internationalen OR.," 59 Z.Schweiz. R. N.F. (1940) 239, 245.

which were free to choose their method, had no doubt about the rule.⁶²

Despite this practice, prevailing theory⁶³ attacks the freedom of the parties to a contract to determine the law that shall govern its validity, because this enables them to evade compulsory rules of a law otherwise controlling. It has been said that to allow parties to select their law would elevate them to the rank of a legislature and delegate to them a sovereign power. Hence, it is supposed, each contract must be localized in one state whose law shall prescribe whether the contract is valid and whether, or to what extent, the parties are allowed to submit controversies to the law of another state. To recognize an agreement respecting applicable law before determining which law governs the validity of the agreement, is accordingly regarded as putting the cart before the horse.

On the other hand, courts operate on the unassailable basis of a customary, extremely well-settled conflicts rule. Autonomy is needed in the first place by international and, in this country, also by interstate commerce. For such matters, at least in peace time, few compulsory, imperative rules of law are provided in the national legislations; existing prohibitions will more often than not be considered by the court in which the contract is in issue either from the viewpoint of local public policy or as a defense based on illegality of performance. Thus, the danger that prohibitions established by one law may be evaded by a party exercising the right to select another law is practically negligible, so that a state ordinarily has no substantial interest, as the theory postulates, warranting intrusion into the international freedom of contracting. On the contrary, the merchants have an enormous interest that a certain

⁶² RABEL, 1 *Z.ausl.PR.* (1927) 42.

⁶³ See the endless lists of majority opinions by CALEB, *Essai sur le principe de l'autonomie et de la volonté en droit international privé* (1927) 81; MELCHIOR 500 § 353 n. 1; GUTZWILLER 1606 n. 1; BATIFFOL 11. Exceptional positions were taken by KOSTERS (1917) 733; SURVILLE (1925) 351.

and preknown body of rules should govern future litigation. They are surrounded by a chaos of national conflicts laws and national legislations, private and commercial. Contracts between merchants of different nations are likely to touch several territories. No attorney is able to predict the law under which the various rights and duties of the parties will be adjudicated in all courts in which litigation may occur. This primordial need for relative certainty is documented by the multitudinous usages and standard forms of the several branches of international trade and impels courts familiar with business requirements, British, French, German, and Swedish, to grant the parties wide latitude. They usually assert without qualification that the applicable law is determined by the parties.⁶⁴

Nonmercantile situations must be independently evaluated. The case in which Dumoulin advocated autonomy of the parties involved marriage settlements; the French courts still insist on free choice of law by the parties in this case. The prevailing view, however, is that the law governing in the absence of a settlement, controls the permissibility of the settlement,⁶⁵ including any agreement respecting the applicable law. In fact, as contrasted with business contracts, marriage settlements are frequently subjected to restrictions imposed by law.

The attitude of the courts has finally received the support of a succession of German⁶⁶ and an increasing number of French⁶⁷ writers. The dominant theory has also been criticized

⁶⁴ See, e.g., for English dicta, CHESHIRE 250.

⁶⁵ See *infra*, Effects of Marriage on Property, Chapter 10.

⁶⁶ The first opposition to the dominant reasoning was expressed in my observations, 1 Z.ausl.PR. (1927) 42 n. 1, and Book Review, 4 Z.ausl.PR. (1930) 417; also in 18 Revista Der. Priv. (1931) 321, 363, for the reasons explained above; more study was given with arguments of varying kind by HAUDEK, Die Bedeutung des Parteiwillens im internationalen Privatrecht, Rechtsvergl. Abhandl. no. 7 (1931); MELCHIOR 498 § 351 ff. (1932); NUSSBAUM, D. IPR. 214 (1932); M. WOLFF, IPR. 84 (1933).

⁶⁷ LEREBOURS-PIGEONNIÈRE, Note, DALLOZ 1931.2.33 and Précis 279 no. 250 (1937); WIGNY, "La règle de conflit applicable aux contrats," Revue Dr. Int. (Bruxelles) (1933) 676; PLANIOL, RIPERT et ESMEIN, 6 Traité pratique

of late in the United States; ⁶⁸ that the cases do not confirm the hostility of the Restatement to election of law by the parties, is well known. ⁶⁹

Hence, the recent literature interests itself more in the limits to be imposed upon the autonomy of the parties' intention than in challenging its existence. ⁷⁰ Consideration was given to a particularly important phase of this problem in connection with the uniform conflicts rules in relation to sales of goods prepared by the International Law Association and the Sixth Hague Conference. ⁷¹ The British lawyers were in significant opposition to the insistence of Continental scholars that the validity of an agreement making a certain law applicable, should be subject to the same law that, under the intended Convention, should be applied in the absence of such agreement. The proponents of this restriction claimed that this would ensure greater certainty for the parties than if the law of the forum were to determine the validity of the agreement. However, the entire discussion and others that followed in the literature make it desirable to sound a warning that business security will be further menaced by ensnaring commercial autonomy in a network of limitations through a combination of substantive and conflicts rules.

641 no. 467; PERROUD, *Clunet* 1933, 289; BATIFFOL 8; J. DONNEDIEU DE VABRES 253; also JEANPRÊTRE, *Les conflits de lois en matière d'obligations contractuelles, selon la jurisprudence et la doctrine aux États-Unis* (1936) 137. Cf. RHEINSTEIN, *Book Review*, 37 *Col. L. Rev.* (1937) 327.

⁶⁸ COOK, "Contracts and the Conflict of Laws," 31 *Ill. L. Rev.* (1936) 143 at 145; COOK, *Legal Bases* (1942) at 349; and *ibid.* 389; and see LORENZEN and HEILMANN, "The Restatement of the Conflict of Laws," 83 *U. of Pa. L. Rev.* (1935) 555; WILLIS, "Two Approaches to the Conflict of Laws: A Comparative Study of the English Law and the Restatement of The American Law Institute," 14 *Can. Bar Rev.* (1936) 1; YNTEMA, "The Restatement of the Conflict of Laws," 36 *Col. L. Rev.* (1936) 183.

⁶⁹ See the writers cited in the precedent note and in a detailed criticism by NUSSBAUM, "Conflict Theories of Contracts: Cases versus Restatement," 51 *Yale L. J.* (1942) 893.

⁷⁰ See M. WOLFF, *IPR*, 85, 86; and M. WOLFF, "The Choice of Law by the Parties in International Contracts," 49 *Juridical Review* (1937) 110, 118.

⁷¹ A clear resume is to be found in *Int. Law Association*, 35th Report (1928) 136 ff.

Of course, when the world enjoys a reliable uniform conflicts law, neither *renvoi* nor self-choice of law will be so largely needed as today.

II. THE PURPOSE OF CONFLICTS LAW

1. Uniformity

Since Savigny, it has been customary to regard the attainment of uniform solutions as the chief purpose of private international law. Cases should be decided under the same substantive rules, irrespective of the court where they are pleaded.⁷² We may gratefully note that this postulate has continued in favor, if only as an ideal remote from reality, at a time when separate conflicts laws have grown up in the various countries and their diversities have been prized. The real value of this postulate under present conditions is that it forms a test for the relative convenience of conflict rules.⁷³ The time has come to approach the goal with more energy.

One of the considerations leading to a universally useful rule is the legitimate expectation of the parties. Not to disappoint fair assumptions by persons disposing of property or entering into engagements, was the justified motive of the twisted doctrines protecting vested rights.⁷⁴ For example, formalities are subject to the law of the place where a transaction has been concluded; the acquisition of property is governed by the law of the situs as of the time of the acquisition; capacity to contract a business obligation partly is, or should be, determined by the law governing the validity of the contract,

⁷² SAVIGNY § 348; recently, for instance, TAINTOR, "‘Universality’ in the Conflict Laws of Contract," 1 *La. L. Rev.* (1939) 695, 699; HANCOCK, *Torts in the Conflict of Laws* (1942) 54.

⁷³ See WOLFF, *IPR.* 6; WENGLER, 8 *Zausl.PR.* (1934) 196; MAURY, 57 *Recueil* 1936 III 325 at 423; NEUNER, "Policy Considerations in the Conflicts of Laws," 20 *Can. Bar Rev.* (1942) 479, 483.

⁷⁴ GOODRICH, "Public Policy in the Law of Conflicts," 36 *W. Va. L. Q.* (1930) 156, 167ff. and GOODRICH 5; CHESHIRE 4, 90; NEUNER, 20 *Can. Bar Rev.* (1942) at 482, *supra* n. 73.

et cetera. "When a matter has been settled, in conformity with the law then and there controlling the actions of the parties, the settlement should not be disturbed because the point arises for litigation somewhere else." ⁷⁵ This "fundamental premise" suggests that courts should search, in the absence of express intentions with respect to the applicable law, for the "tacit" and eventually the "presumed" intentions of the parties.

Moreover, as a European writer has recently postulated, when a fact or an act is governed by a certain law according to all the conflicts laws practically involved, this law should be applied by any court before which the case may come as a result of subsequent circumstances.⁷⁶

In a more general way, Savigny regarded it a guarantee of uniform treatment of legal relations that the law of that place where the relation has its legal "seat" should be applied everywhere—a conception that through Wharton has been admitted in the Supreme Court of the United States.⁷⁷ Gierke substituted for "seat" "center of gravity"; Bar sought localization "according to the nature of things"; and Westlake recommended the law of the state with which the relation has closest connection. All these formulas tend toward the same goal, the importance of which still is in no wise impaired. But the obstacles barring the way to the goal have increased since the world order envisaged by Savigny has been dissolved into more than a hundred national legal systems.

In view of the difficulties of reaching uniformity, a more modest aspiration has been correctly proposed by Cook, namely, to attain "as much certainty as may be reasonably hoped for in a changing world" and is compatible with "needed flexibility."⁷⁸

⁷⁵ GOODRICH, 36 W. Va. L. Q. (1930) 156, 164, *supra* n. 74.

⁷⁶ MEIJERS, "La question du renvoi," 38 Bull. Inst. Int. (1938) at 225.

⁷⁷ Pritchard v. Norton (1882) 106 U. S. 124 at 130.

⁷⁸ COOK, Legal Bases 432.

2. Policy Considerations

A just result or the realization of prescribed policies is now often viewed as the main purpose of conflicts law.⁷⁹ This is right without doubt, if certain fundamental distinctions be borne in mind.⁸⁰

(a) The usual confusion of private and conflicts laws has engendered the conception that both have to follow the same pattern of values and purposes. If this were true, all the differences that permeate the national laws with respect to the organization of the family, the categories of property rights, freedom of contract, privileges and duties, public interests, and so on, would be reflected, nay reproduced, in the conflicts rules of the divers countries. The writers have formulated their axioms according to their particular views. Kahn,⁸¹ for instance, who considered relationships created by internal law to be the subject matter of conflicts rules, required conformity with the fundamental idea of the internal institution. If, in the doctrine of the internal law, parental power is regarded as a mere right, the father's personal law should govern; if the father's duty is accentuated, the law of the child. Under Pillet's leadership, French writers transformed their doctrine of sovereignty⁸² so as to require the determination of what law ought to govern capacity to contract, succession on death, etc., in conformity with the "social purpose" of the state regulations pertaining to personality, family, security of commerce, etc.; the applicable law is that which most efficiently

⁷⁹ See in particular NEUNER, *Der Sinn* (1932); CAVERS, "A Critique of the Choice-of-Law Problem," 47 *Harv. L. Rev.* (1933) at 173; NEUNER, "Policy Considerations in the Conflicts of Laws," 20 *Can. Bar Rev.* (1942) at 486; HARPER and TAINTOR, *Cases* (1937) 55, recognize "a desirable result" in their third and fourth classification of "social policies."

⁸⁰ RABEL, 5 *Z.ausl.PR.* (1931) 284.

⁸¹ KAHN, 1 *Abhandl.* 112.

⁸² See DE VOS, 15 *Revue Inst. Belge* (1929) 1, 97; 16 *ibid.* (1930) 133.

protects the purpose fostered by the forum's own domestic legislation.⁸³

This identification of motives, sometimes extremely consequential, aggravates the difficult task of the conflicts law beyond all limits. To care for social prosperity is the responsibility of the municipal private laws, which have to resolve the merits of each particular problem. The principle, *jus summi cuique tribuere*, instructs legislators and judges to ponder carefully private and public interests. But this is what each private law does for itself; the function of private international rules is to choose the applicable law with all its evaluations whatever they may be. Existing conflicts law presumes that all laws of civilized countries are of equal rank, not to speak of sister states in a federation. Assuredly, the origin of this idea was political, and its modern theoretical foundation came from its connection with the law of nations. But, as things are, to inject national policies directly into conflicts law, will destroy it. In such event, "international public order" would embrace all internal laws.

(b) When preconceptions are eliminated, policy in the field of conflicts law is of course the main object of concern. Conflicts rules have never been entirely uninfluenced by the underlying social situation. This is pioneer ground. How the interest of the state, of other states, of the parties, of third persons in good faith, of commerce or trade in general, are to be valued against each other in various situations and best reconciled with the postulate of certainty, needs renewed and detailed deliberation. For the time being, it would be entirely premature to try to enumerate or to analyze such considerations in a general way.

(c) The postulate that conflicts rules should have just results may be understood—or perhaps misunderstood—as signifying that the outcome of lawsuits in every case should conform, not to the *lex fori*, but to the judge's sense of justice.

⁸³ See the illustrations of NIBOYET 500 no. 416.

We well know that courts will try many direct or devious ways to satisfy this sense of justice. They will use the faculty to reject a foreign rule on the ground of a public policy of the forum. They will classify an unwelcome foreign rule as inapplicable foreign procedure. They will, with a desired end in view, affirm or deny a person's domicile. And we may trust the courts always to select, of two accessible ways, that which leads to the result to them appearing preferable.⁸⁴ These expedients of judicial wisdom cannot be closed entirely, and should not be, while conflicts rules remain crude and vague. It is good to know that inscrutable judgments occasionally alleviate the conflicts chaos.

Yet, subservience to subjective and local values would be dangerous and unsound as a general policy. Cavers seems to envisage disintegration of conflicts rules as the consequence of his postulate of just results and, by way of palliation, recommends re-enforcement of the doctrine of *stare decisis* and recourse to standards.⁸⁵ Such programs, not sufficiently detailed, are disturbing.

Several points discussed in this chapter are illustrated in the case of *St. Louis-San Francisco Railway Company v. Cox*.⁸⁶ The plaintiff, having been injured on a passenger train in Missouri, for consideration released her rights to the local agency of the railroad by a document executed in Missouri. Under a statute of Missouri, she could not bring an action to cancel the release without refunding the sum received. Without doing so, she sued in Arkansas, and the Supreme Court held (1) that the failure of tender was characterized in Missouri as going to the basis of the right, but (2) that in Arkansas

⁸⁴ American courts prefer to satisfy a desirable solution in usury cases than to have all decisions harmonized. See STUMBERG 212, and WENGLER, Book Review, 11 Zausl.PR. (1937) 967.

⁸⁵ CAVERS, 47 Harv. L. Rev. (1933) 173 at 196, *supra* n. 79. Recently CAVERS himself has confessed troublesome doubts concerning his reference to social and economic considerations, Book Review, 56 Harv. L. Rev. (1943) 1170 at 1173.

⁸⁶ *St. Louis-San Francisco Railway Company v. Cox* (1926) 171 Ark. 103, 283 S. W. 31; HARPER and TAINTOR, Cases 272.

such a suit could be prosecuted without returning the sum, and (3) that, therefore, the question being merely procedural in the forum, the suit should be allowed. From the viewpoint of a sound system (or of analytical jurisprudence), there are three fundamental objections to be made. (1) The Missouri provision is questionable, though possibly directed against ambulance chasing. (2) Yet, even if wrong, the provision is of course substantive, affecting the material rights of the plaintiff, any procedural consequence being merely accessory. The law of Arkansas not requiring tender is equally substantive; it denies what the other law affirms. (3) The Court evidently applied the law of the place where the contract was made and performed. On this ground, it should not have evaded its own conflicts rule, as it did by a characterization according to the alleged *lex fori*. What really was intended is obvious, however. The Court wanted desperately to satisfy its own sense of equity as against an objectionable foreign law.

III. RATIONALIZATION

I. Special Rules

Inductive methods include the creation of special rules for typical situations. Case law in this country has produced a wealth of such specific rules, whereas the European codifications have been satisfied to formulate conflicts rules in very broad and generalized terms. Specialization of the rules has recently become a recognized tendency, particularly in the field of obligations, in which, even in this country, general axioms have done much harm. The Institute of International Law has been active in this direction since 1908. The Polish Law of 1926 (art. 8) states different points of contact appropriate to the various types of contract—contracts executed at an exchange or market, retail bargains, construction and employment contracts with the state and other public corpo-

rations, insurance contracts, contracts with attorneys and similar persons, employment by business enterprises, *et cetera*. The Permanent Court of International Justice has held that a governmental loan by issue of bonds having several places of payment is subject to the law of the issuing government.⁸⁷ Maritime shipping contracts have been made the subject of special international conventions.⁸⁸ The scope of a power of attorney is determined under the law of the state in which the agent acts.⁸⁹ Courts in all countries have elaborated a wide-flung net of specialized solutions by localizing contracts according to the "tacit," "presumed," or simply the fictitiously assumed intent of the parties.⁹⁰

This growing emphasis on the law corresponding to the particular type of contract has two additional wholesome effects, namely, promotion of uniformity, since types of contracts are the same everywhere under modern circumstances, and concentration—so far as feasible—on one convenient law. In the latter regard—the problem of *dépeçage*⁹¹—it is noteworthy that both American and Continental conflicts laws suffer from cumulated application of several conflicts rules, referring to different legislations, to one and the same contract. The Restatement, for instance, divides the problems arising on a contract into two parts, subjecting one part to the law of the place where the contract is concluded and the other to the law of the place where the contract is to be performed.⁹² The division is precarious and very objectionable in several respects, but chiefly because a contract should not be split on *a priori* grounds. A similar distinction between the

⁸⁷ Judgments nos. 14 and 15 of July 12, 1929.

⁸⁸ Cf. for instance, the provisions of the Montevideo Treaty of 1889 on commercial law, arts. 14 and 15, changed in the Draft of 1940 on commercial maritime law to art. 25.

⁸⁹ Restatement § 345; RABEL, 3 Z.ausl.PR. (1929) 812ff.

⁹⁰ For a synthesis, see BATIFFOL.

⁹¹ For theoretical discussion of the method of connecting isolated parts of the facts with different countries, see WENGLER, 8 Z.ausl.PR. (1934) 230.

⁹² Restatement §§ 332 and 358; cf. in particular COOK, Legal Bases 345, 346.

creation and the effect of contracts is admitted by the Swiss Federal Tribunal.⁹³ Still worse, the German courts allocate the duties of the seller and the buyer to the laws of their respective places of performance, these, if not otherwise provided, being presumed to be at the corresponding domicils. A bilateral contract cannot be broken up into such fragments without distorting a number of problems.⁹⁴ All such rules will vanish when the different types of contracts rather than different parts of contracts in general form the center of interest.

Another point will hold our attention in the next chapters. Capacity to contract is generally determined in this country by the law of the place where the contract is made, a law not necessarily the same as the law governing the contract in other respects, for instance, that intended by the parties. In Continental Europe, an individual's capacity is determined as a rule by his personal law, a law potentially different from that or those governing other aspects of the contract. In both hemispheres, the respective rules concerning capacity appear overextended, and the distinction between capacity and other aspects of contracts, at least in certain cases, should be abolished.⁹⁵

2. Independent Conflicts Rules

The crucial point to be reformed is the blind subjection of conflicts rules to the private law of each country. The extremely broad and at the same time fragmentary rules usual in the enacted conflicts laws of the nineteenth century, including the Introductory Law to the German Civil Code, incorporate language taken from provincial legal thinking. As these rules are progressively refined, the more urgent is their independence of notions defined by the law of the forum in order to enable other legal systems in the pertinent cases to be invoked.

⁹³ *Supra* n. 61.

⁹⁴ See NEUNER, 2 Z.ausl.PR. (1928) 108.

⁹⁵ *Infra* p. 195.

This need is by no means limited to "characterization." Cook has pointed out how often in this country confusion is caused by applying the "law" of a state, without exact inquiry whether such law is not limited to domestic cases and raises no question of conflicts law.⁹⁶ Thus, a statute of Texas prescribing that a married woman cannot charge her separate estate to secure her husband's obligation, does not necessarily impose such restriction upon a wife domiciled in another state, even when the transaction occurs in Texas.⁹⁷ Resort to statutory construction is the usual method of avoiding faulty conclusions. This method, however, should be limited to its natural domain. A statutory provision must be analyzed in respect to the question whether it incorporates a fundamental policy of the state (as in the case of the Texas statute mentioned). It may occasionally occur also, as we have remarked before, that a private law rule is not intended or is not fit to be applied in another jurisdiction, a situation that much more frequently occurs in the case of administrative (police) regulations. But answers to the regular questions of conflicts law are rarely contained in municipal statutes. Private law rules ordinarily do not direct which persons or movables they include. It is as mistaken to apply such rules blindly to events all over the world as to presume them limited to merely domestic situations. They are simply neutral; the answer is not in them. Generally, therefore, what is needed, or even feasible, is not an interpretation of the statute but a rule of private international law to accompany and delimit the rule of private law. A striking example is the confusion exhibited in determining the relation between adoption and inheritance statutes in different states, a confusion chiefly attributable to futile attempts to interpret one or the other of these statutes, neither dealing with conflicts questions.⁹⁸

⁹⁶ Cook, *Legal Bases*.

⁹⁷ Cook, *Legal Bases* 438, 439.

⁹⁸ *Infra* pp. 195 and 652.

A full program for the needed reform cannot be outlined in this place. There is no reason why this branch of law should not enjoy the abundance of legal devices, characterizing modern private or penal law.

3. Internationalization

Against the expectation of *a priori* theorists, it is remarkable to what extent conflicts rules are able to serve in many countries, once relieved from the burden of local legal techniques and related to situations in actual life. The modern means of communication, the organization of international trade, the progress of science, and some general trends in the evolution of social policy, provide a common basis. An unbiased examination of the actual facts represented by an international sale, an employment contract, a claim for workmen's compensation, or a negotiable instrument payable to the holder, should and will result in similar solutions everywhere. As a matter of fact, there exists a truly international consideration of all these and many other matters, which encounters few obstacles in national legal peculiarities but many in doctrinal traditions.

Here it is that comparative research again comes in to indicate whether and, if so, to what extent unification or mutual reconciliation is feasible and desirable. In one respect, this statement requires qualification. With little justification, the comparative method is often suspected to favor imitation of alien ways and to sacrifice national characteristics. The facts are to the contrary.⁹⁹ Not infrequently, foreign institutions,

⁹⁹ See, for example, FUSTEL DE COULANGES, *La cité antique* 2: "Pour avoir mal observé les institutions de la cité ancienne, on a imaginé de les faire revivre chez nous." HEYMANN, *Das ungarische Privatrecht und der Rechtsausgleich mit Ungarn* (1917) 96; EUGEN HUBER, *Erläuterungen zum Vorentwurf des Schweizerischen Zivil-Gesetzbuchs* 7; RABEL, *Aufgabe und Notwendigkeit der Rechtsvergleichung*, published as *Münchener Juristische Vorträge* Heft 1 (1925) 9, 23.

naïvely adopted without adequate comparison, have been transplanted from their natural soil to degenerate in uncongenial surroundings. Often also, "reception" of foreign legal institutions has occurred without appreciation of the grave defects inherent in an admired law. Scientific comparison discerns the essential from the accidental causes and effects of legal rules; its purpose is to enrich, rather than to standardize the juridical world.

Conflicts law, however, has its own measures. It urgently requires sanctuaries from chaos. The more private rights are protected by international justice, the more will unification be desired. Federations such as the United States or Switzerland¹⁰⁰ know from copious experience how indispensable is a common background of legal concepts and principles to cope with the peculiar terms and ideas of particular states or cantons. The Mixed Arbitral Tribunals of the 1920's plainly exemplified the situation of courts that lack a "law of the forum" in the ordinary sense of the term and have no conflicts rules other than those that happen to coincide in the participating states.¹⁰¹ The great expectations for a development of this branch of law by these courts, first dealing on a large scale with international private causes, were disappointed.¹⁰² After the present catastrophes, fervent hopes may well attach to supranational courts adjudging private actions of international significance.¹⁰³ But any substantial develop-

¹⁰⁰ BG. (June 30, 1905) 31 BGE. I 287: for the purpose of intercantonal conflicts law, the scope of matrimonial property law, as contrasted with inheritance law, is to be defined according to the *general Swiss concepts and the nature of things* rather than to the cantonal laws involved in the case.

¹⁰¹ See RABEL, 1 Z.ausl.PR. (1927) 33-47.

¹⁰² On the conflicts cases of the Mixed Arbitral Tribunals see GUTZWILLER, "Das Internationalprivatrecht der durch die Friedensverträge eingesetzten Gemischten Schiedsgerichtshöfe," 3 Int. Jahrbuch f. Schiedsgerichtswesen (1931) 123.

¹⁰³ The Institute for International Law proposed in 1929 to extend the jurisdiction of the Permanent Court of International Justice to disputes concerning the interpretation of the conventions on private international law; see *Annuaire*

ment of such judicial relief will have to be accompanied by a radical turn of choice of law rules from provincial to world-wide thinking.

The new trend can be summarized in the three-fold effort toward realism, comparative method, and international understanding.

1929 III 305. This suggestion has been taken up by the Protocol of March 27, 1931 (*supra* p. 32), recognizing the competence of the Permanent Court of International Justice to interpret these Conventions. In my opinion regional international courts and a second division of the World Court should be created to deal with various kinds of private claims having international significance.

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PART TWO

PERSONAL LAW OF INDIVIDUALS

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CHAPTER 4

The Personal Law

I. NATURE AND SCOPE OF PERSONAL LAW

1. Personal Law Defined

THE term "personal law" had its origin in the doctrine of the Italian school of postglossators (thirteenth-fifteenth centuries) and their French successors (sixteenth-eighteenth centuries). This school divided all rules of law into three categories, viz., *statuta realia*, *statuta personalia*, and *statuta mixta*. *Statuta personalia*, "personal statutes," comprised those rules of law that followed a person from one jurisdiction to another, thus having "extraterritorial effect," while the rules of the "statute real" applied exclusively within the territory of a single sovereign. Ever since the times of the postglossators, the terms have been in use but with considerable variations in meaning.¹ Even today writers disagree in defining personal law, and particular rules of law are variously characterized as pertaining to the realm of the statute real or to the statute personal.²

Despite these differences, however, it is commonly assumed that in certain respects the legal position of an individual should normally be determined by the law of that state with which he is deemed to be connected in a permanent way, rather than by the divergent laws of those states in which he may happen to be physically present, to act, or to engage in transactions. This proposition includes two parts:

First, that a person is attributed certain legal characteristics of a comparatively permanent character; and,

¹ 2 ARMINJON (ed. 2) 70 ff. nos. 18-18 *ter*.

² Cf. for instance, WALKER 24.

Second, that these permanent characteristics ought to be determined by one law for all purposes rather than from case to case by different laws.

Scope of the personal law. The sphere of application of the personal law has fluctuated in the course of time and is not everywhere the same today. Under the broadest definition, problems pertaining to the following subjects would be regarded as problems of personal law:

Personality or capacity to have rights in general (German *Rechtsfähigkeit*, French *capacité de jouissance*);

Beginning and end of personality;

Capacity to engage in legal transactions (German *Geschäftsfähigkeit*);

Protection of personal interests, such as honor, name and business firm, privacy, and the like;

Family relations, especially the relations between husband and wife, parent and child, and guardian and ward, also transactions of family law, especially marriage, divorce, adoption, legitimation, emancipation, and appointment of a committee for an incompetent person;

Succession, both testate and intestate, to movables and in more recent times also succession to immovables.

While in the various civil law countries this list is subject to varying restrictions, it is sharply reduced in American law. It is true, the general principle, repeatedly stated by British courts and textwriters, that the "status" of a person is determined by the law of his domicile,³ is plainly accepted in the United States,⁴ where it has even been called "the most widely advocated rule of conflict of laws."⁵ Nevertheless, current

³ DICEY 634; CHESHIRE 208.

⁴ Pfeifer v. Wright (1929 D. C. N. D. Okla.) 34 F. (2d) 690; Strader v. Graham (1850) 10 How. (51 U. S.) 82; Woodward v. Woodward (1889) 87 Tenn. 644, 11 S. W. 892 (emancipation in Louisiana); and others.

⁵ HARPER and TAINOR, Cases 271 n. 17. See STORY § 57 ff. and § § 94-96 and 1 WHARTON § § 101-104 2/3, both recognizing only restrictions of public policy on the ubiquity of personal law.

opinion in the United States is inclined to ascribe to the personal law a domain narrower than it receives in England⁶ and much more limited than it enjoys on the Continent. In particular, capacity to contract is now preponderantly regarded as being determined by the law of the place of contracting rather than by the law of the domicile, although in a few American decisions⁷ the domiciliary law has been recognized as governing an individual's capacity to contract and in numerous cases it coincides with that of the place of contracting.⁸

Beale goes still further in reducing the significance of "status," perhaps since he encountered difficulties in reconciling an ubiquitous personal law with the system of territoriality that he advocates.⁹ In his treatise and in the Restatement, he proposes to delete what may be described as a remnant of a former status law, except for a strictly limited number of family relationships, such as marriage, the relation between parent and child, adoption, and guardianship. Although status is defined in the Restatement in general terms¹⁰ and although the topics dealt with in Chapter 5 of the Restatement are designated merely as "those of chief importance," they seem nevertheless to be all-inclusive.¹¹

⁶ See the results reached by DICEY 634-637, 931, 966, and more recently CHESHIRE 208 ("a rule which regulates the capacity or incapacity of a person is part of the law of his status"). For the entire problem, see below, p. 190.

⁷ Especially *Brown v. Dalton* (1889) 105 Ky. 669, 49 S. W. 443; also *Huy's Appeal* (1854) 1 Grant (Pa.) 51; *Ritch v. Hyatt* (1879) 3 MacArthur 536 (10 D. C.); *Matthews v. Murchison* (1883 C. C., E. D. N. C.) 17 Fed. 760; *Freeman's Appeal* (1897) 68 Conn. 533, 37 Atl. 420; cf. 2 BEALE 1180 n. 4.

⁸ Cf. RUDOLF MUELLER, 8 Z.ausl.PR. (1934) 888-890; BATIFFOL 328.

⁹ See WIGNY, *Essai* 75.

¹⁰ Restatement § 119 and comment.

¹¹ In the Restatement, "status" is not treated as containing permanent conditions or qualities, but it is limited to such "relationships" between persons as have been described by BEALE as relative in contrast to absolute ones, 2 BEALE 649. This narrow definition has been criticized by KUHN as being made "wholly from the viewpoint of one (i.e., the American common law) system," whereas, in solving problems of conflict of laws, the attribution of capacity and incapacity to persons has also to be considered. KUHN, *Comp. Com.* 115.

This position will attract the attention of any civil law writer as a striking contrast to established doctrines. In all countries outside of the United States, the concept of personal law has preserved a dominant position and has retained more vigor than its ancient opponent, the territorial law, which has found such eminent defenders in this country. On the other hand, the traditional theory has been challenged in several respects by recent European critics, and reference has repeatedly been made to the American rules for this purpose.

The broader conception of the personal law is to be found authoritatively defined in recent treaties concluded between Western and Oriental powers, whereby foreigners are exempted from the territorial jurisdiction in "matters of personal law." It is interesting to note that the United States has participated in such treaties. The following definition is given, for instance, in the Agreement between the United States and Persia, concluded on July 11, 1928:¹²

"Whereas Persian nationals in the United States of America enjoy most-favored-nation treatment in the matter of personal status, . . . non-Moslem nationals of the United States in Persia shall be subject to their national laws in the said matter of personal status, that is, with regard to all questions concerning marriage and conjugal community rights, divorce, judicial separation, dowry, paternity, affiliation, adoption, capacity of persons, majority, guardianship, trusteeship, and interdiction; in regard to movable property, the right of succession by will or *ab intestato*, distribution and settlement; and, in general, family law."

By the Convention of Montreux of May 8, 1937, which abolished the system of capitulations in Egypt, the Mixed Tribunals were retained for a further period, running until 1949, and status and capacity were declared to be subject to the jurisdiction of these tribunals in the absence of consular jurisdiction where the religious courts are not competent. This

¹² Published in U. S. Executive Agreement Series No. 20.

Convention provided the following definition of personal status:

"Personal status comprises: suits and matters relating to the status and capacity of persons, legal relations between members of a family, more particularly, betrothal, marriage, the reciprocal rights and duties of husband and wife, dowry and their rights of property during marriage, divorce, repudiation, separation, legitimacy, recognition and repudiation of paternity, the relation between ascendants and descendants, the duty to support as between relatives by blood or marriage, legitimisation, adoption, guardianship, curatorship, interdiction, emancipation and also gifts, inheritance, wills and other dispositions *mortis causa*, absence and the presumption of death."¹³

2. Legal Problems

Status. Usually, "status," taken from the Roman doctrine of *status libertatis* (freedom), *status civitatis* (citizenship), and *status familiae* (position as head of the house or as free person subjected to the *pater familias*)¹⁴ refers to situations subjected to the personal law. The word, "status," is commonly used but should not be taken as a precise legal term. Its exact meaning in English law has been discussed in many places but in a manner described by competent English writers as confused.¹⁵ "Of all the perplexing questions which the

¹³ Rules concerning Judicial Organisation in Egypt, art. 28, referred to in art. 10 pars. 1 and 2 of the Convention Concerning the Abolition of the Capitulations in Egypt, Montreux, May 8, 1937. Text in U. S. Treaty Series, No. 939, in 34 Am. J. Int. Law Supp. (1940) 201, 182 League of Nations Treaty Series (1937-1938) 37, and in HUDSON, 7 Int. Legislation 684 No. 480-480c. The Convention has been ratified by the United States, Egypt, Belgium, Great Britain and Northern Ireland, Canada, Australia, Union of South Africa, New Zealand, India, Denmark, Spain, France, Greece, Italy, Norway, the Netherlands, Portugal, and Sweden. See comment in 1 STREIT-VALLINDAS 385-400. Cf. comment in 19 Brit. Year Book Int. Law (1938) 161; MORELLI in 29 Rivista (1937) 324, 329. Other provisions in the Regulations contain elaborate rules on conflict of laws, prepared on the basis of the Hague Conventions.

¹⁴ In the Roman sense status means a degree in legal capacity; cf. SIBER, 2 Römisches Recht (1928) 25.

¹⁵ See CHESHIRE 208 and for a survey ALLEN, "Status and Capacity," 46 Law Q. Rev. (1930) 277.

science of jurisprudence presents, the notion of status or condition is incomparably the most difficult," declared Austin.¹⁶ Some American decisions also have considered the concept nebulous, while unwarranted conclusions have been deduced from it by others.¹⁷ In fact, modern law recognizes no absolute legal characteristics inherent in a person as in the Roman or medieval laws. Qualification of an individual as husband or legitimate father indicates no more than the existence of legal relations with another person, although it is true that third persons may thereby to a certain degree be excluded from challenging the relationship.

Prohibitive policy. It is universally agreed that foreign laws affecting a person's status are to be disregarded where they have a political or penal character.¹⁸ Hence, such impairments of a convict's capacity to enjoy civil rights or to engage in transactions as are provided by the English Forfeiture Act of July 4, 1870, the French Law of May 31, 1854 (arts. 2 and 3), or American civil death statutes, are not enforced by the courts of other states.¹⁹

Likewise, a law or decree disabling a person from disposing of his property, in a manner discriminating against him rather than for the purpose of his protection, is generally denied effect outside of the state of enactment.²⁰ Thus the

¹⁶ AUSTIN, 1 *Jurisprudence* (ed. 5, 1885) 351; 2 *ibid.* 943: "To fix the notion of status with perfect exactness, seems to be impossible."

¹⁷ See the penetrating observations of TAINTOR, "Legitimation, Legitimacy and Recognition in the Conflict of Laws," 18 *Can. Bar Rev.* (1940) 589, 591, 691-697.

¹⁸ See STORY § 104; 1 WHARTON 18 § 4b; STIMSON, *Conflict of Criminal Law* (1936) 1; 1 BAR § 146. It is no exception to this rule, that a person may be considered incapable of being entrusted with a function, such as guardianship, because of a foreign conviction; see e.g., Spanish C. C. art. 237 par. 2 and TRÍAS DE BES 72 no. 99.

¹⁹ The Treaty of Montevideo on international civil law, text of 1940, art. 1, 2nd sentence, provides that no incapacity of a penal character nor for reasons of religion, race, nationality or opinion will be recognized. On the non-application of foreign civil death statutes, see Note in 6 *U. of Chi. L. Rev.* (1939) 288.

²⁰ See the recent decision of Trib. comm. Bruxelles (June 9, 1938) *Jur. Comm. Brux.* 1938, 412, and App. Zürich (March 1, 1939) 42 *Bull. Inst. Int.* (1940) 87.

Soviet Russian monopoly of trade prohibiting all private persons residing in Russia from concluding contracts with foreign countries except through the Commissariat of Commerce, like other monopolies of public law, is inapplicable outside of Russia.²¹

Connection of a person with a given territory. What connection must exist between an individual and a particular state in order to subject such person to the personal laws of that state? There are two different systems. In certain countries, the necessary connection is deemed to exist between an individual and a particular state, if the individual is one of its nationals; in other countries, the necessary connection is found in the fact that the individual is domiciled in the state in question.

3. Rationale

While, a generation ago, the existence of a personal law was explained by such theoretical arguments as the nature of law, the needs of sovereignty, the character of the power of a sovereign over persons, and the like, in recent times the advocates of the theory of personal law customarily resort to more practical considerations of convenience and expediency.

A first line of argument is based upon the interests of the individuals concerned. The legal position of a person, it is said, must be the same everywhere; it would be unjust and impracticable to have it determined in different ways in different countries or in different situations, perhaps in some instances even in the same court. In other words, the unity and identity of a person should be respected and guaranteed by the consistent application of one and the same law in all countries and in all situations.

A second line of reasoning has become singularly effective today. Each state is said to have a profound governmental in-

²¹ MAKAROV, *Précis* 194 reaches the same result by another (mistaken) reasoning.

terest in the regulation of the personal status and the family relations of its subjects,²² an interest which every other state ought properly to respect. In order to protect this interest more effectively, exclusive jurisdiction over questions of status is often claimed by the state of the personal law, or the rules of the personal law are declared to belong to the domain of public policy. Thus, a state which adheres to the principle of nationality attempts to extend its own system of social regulation to its nationals living abroad, whereas a country adhering to the principle of domicil imposes its own laws upon the foreigners living within its borders. These tendencies, and particularly that of extending one's own laws to nationals living abroad, are so firmly rooted in the political traditions of Europe that recent counter-currents have not only failed to leave any deep impression on the legislatures but have even suggested to an eminent French author that the scope of application of the personal law should be expanded far beyond its present extent.²³

It seems, indeed, that uniform regulation of matters of status is justified, at least with respect to the basic facts of personal life. Whether a person shall be deemed to be married, divorced, adopted, subject to guardianship, or civilly dead, should be decided at any place in the same way, if uncertainty and confusion is not to beset the individual, his family, and other persons with whom he engages in transactions. The weight of this consideration may vary as regards different problems, and careful investigation of the interests at stake ought to be undertaken with regard to each situation. But, essentially, the principle seems undeniable.

²² With respect to those matters that are recognized in the Restatement as covered by status, this governmental interest is explained in § 119 comment c.

²³ BARTIN, 2 *Principes* 20, 90. Throughout the four volumes of FRANKENSTEIN's work, the national law is considered as "the primary basic principle of private international law." See vol. 4, 650.

Recently the Danish writer BORUM recommended that his country go over from the domiciliary principle to that of nationality. See his *Personalstatutet* 552, 565.

The most formidable objection against a single personal law arises from the present state of international law; the doctrine cannot be carried out consistently. Apart from the intricacies caused by conflicting rules of jurisdiction, serious conflicts are due to the difference between the principles of domicile and nationality, resulting in the subjection in different states of one and the same individual to different laws. Moreover, no agreement exists with respect to where a person is domiciled, nor is nationality an unfailing criterion. It should not be overlooked, however, that many such conflicts can be remedied by special techniques, especially by application of the "renvoi," an institution that, on account of its usefulness, should be viewed without theoretical prejudices.

II. CONTACTS DETERMINING THE PERSONAL LAW

I. Domicil

(a) *Domicil of origin.* In all the centuries since the post-glossators, the traditional contact for the determination of a person's status has been his domicile. In earlier, ancient and medieval, organizations, the legal condition of an individual in its totality was created by his "origin" as a member of a political unit, in Roman law his *origo*, signifying his citizenship in an autonomous city. Following the older fundamental role of descent, some of the pandectists in various cases resorted to what was shortly and paradoxically described²⁴ as the *domicilium originis*, generally the domicile of the father of the individual at the time of the latter's birth.²⁵ Although, naturally and legally, a child takes its father's domicile at birth and upon attaining majority may acquire a new domicile, the domicile of origin substituted for the actual domicile, when doubtful or incorrectly obtained or where no domicile was to

²⁴ See SAVIGNY § 359 at n. (q).

²⁵ See SAVIGNY § 359 at n. (n). The same definition of domicile of origin is still proper in English law. See WESTLAKE § 245; 6 HALSBURY 200.

be found. This subsidiary concept was employed in the eighteenth century by French writers and in the Prussian legislation²⁶ as the prime test for determining majority or interdiction for prodigality.²⁷ Even today in Argentina, it is applied to persons without an actual domicil.²⁸ In British countries, this criterion has been retained and singularly developed; not only is the domicil of origin resorted to whenever the domicil of choice cannot be ascertained or has been abandoned without establishing a new domicil, but the courts also require such strong evidence of abandonment of the domicil of origin that it has been said to be "difficult to conceive of a case in which the domicil of origin can be shaken off."²⁹ It corresponds to Continental nationality rather than to Continental domicil.³⁰

(b) *Domicil of choice.* The normal concept of domicil is presented by that domicil which is voluntarily chosen by an independent person. The law of this domicil primarily controls personal relations in the following countries:

All English common law countries and, in addition, Scotland, South Africa, and Quebec (where the principle has been laid down in the C.C. art. 6).³¹

Denmark,³² Norway,³³ Iceland.³⁴

²⁶ Prussian Allg. Landrecht of 1794, Einleitung § 29.

It may be suggested that the same idea is implied in the much discussed words of § 34 of the Austrian Allg. BGB. which may be translated as "laws of the place to which the foreigner is subject (als Untertan unterliegt) by virtue of his domicil or if he has no actual domicil by virtue of his birth."

²⁷ Originally by FROLAND and BOULLENOIS; see PILLET, Principes 304 no. 143 n. 1; 2 ARMINJON (ed. 2) 80 ff. no. 18 *ter*.

²⁸ Argentina, C.C. arts. 96 and 89 2d part; *cf.* 1 VICO no. 392.

²⁹ CHESHIRE 174; *cf.* Lord Macnaghten in *Winans v. Att. Gen.* [1904] A. C. 287 at 291; Lord Hanworth in *Boldrini v. Boldrini* [1932] P. 9.

³⁰ BENTWICH in: *The Law of Domicile in its Relation to Succession and the Doctrine of Renvoi* (1911) 12; 5 Zausl.P.R. (1931) 57; 6 Zausl.P.R. (1932) 715; 52 Jurid. Rev. (1940) 284, 285ff.

³¹ It seems to be recognized in Canada generally; *cf.* 1 JOHNSON 182, 454.

³² BORUM and MEYER, 6 Répert. 216 no. 19.

³³ CHRISTIANSEN, 6 Répert. 569 no. 66.

³⁴ 4 LESKE-LOEWENFELD I 761.

Estonia: Law of the Baltic Prov. (1864) introd. art. xxvii.

Latvia: C.C. (1937) §§ 8-25.³⁵

Argentina: C.C. arts. 6 and 7.³⁶

Brazil: Introductory Law (1942) art. 7.

Guatemala: Constitutive Law on Judicial Power (1933)
art. xvii; Law on Foreigners (1936) arts. 17 and 18.

Nicaragua: C.C. tit. prel. VI, 1.

Paraguay: C.C. arts. 6 and 7.

Peru: C.C. (1936) tit. prel. art. V (for non-Peruvians).

The Treaty of Montevideo of 1889, article 1 (Argentina, Bolivia, Paraguay, Peru, Uruguay) still in force among the contracting countries, is to the same effect. Article 1 of the text of 1940, not ratified, provides that the existence, the status, and the capacity of physical persons are governed by the law of domicil.

(c) *Domicil by operation of law.* In most of the just mentioned countries, although not in all, as for instance not in Norway, certain groups of persons (wife, minor children, etc.) are considered by law to share the domicil of other individuals. The latter accordingly determines the status of the dependent person.

(d) *Residence.* If, according to the concepts of the forum, it is found that an individual has no domicil of choice or as a dependent, either within or without the country, different solutions obtain. English courts apply the law of the domicil of origin. In this country, it is generally assumed that a domicil once established continues until it is superseded by a new domicil.³⁷ This proposition is a direct corollary of the axiom that every person must have a domicil and is therefore cate-

³⁵ SCHILLING, 11 Zausl.PR. (1937) 484, 491.

³⁶ Domicil is decisive not only for capacity to contract but also for personality. See 1 VICO no. 438, rejecting other theories.

³⁷ Restatement § 23 and its various Annotations. See also 28 C.J.S., Domicile § 13.

goric. In addition, it is presumed that an intended change or abandonment of the last established domicil is not completed until a new home has been acquired.³⁸

All these views are represented in Latin-American legislations. In addition, the subsidiary test of residence, well known in such fields as jurisdiction and taxation,³⁹ at times appears in conflicts law. This method has been followed by the Montevideo Treaty⁴⁰ and the *Código Bustamante*,⁴¹ as well as by the recent Brazilian law.⁴² In default of residence, the latter two enactments contain a supplementary reference to the place where the individual is temporarily dwelling.

These expedients would seem to serve well also in this country in cases where the continuance of a former domicil cannot be affirmed without undue fiction.

2. Nationality

The principle that an individual's personal law ought to be determined by his nationality was first established at the beginning of the nineteenth century in the *Code Napoléon*, which provided that the French laws concerning personal status and capacity govern Frenchmen even when residing in foreign countries (Art. 3 par. 3). In the converse case of a foreigner residing in France, the French courts, after some initial doubts, now generally apply by way of analogy the law of the country of which he is a national.

While this French provision exerted a steady influence as a model, an additional powerful impulse was started in the same

³⁸ 28 C.J.S., Domicile § 16.

³⁹ This rule has been adopted in following the doctrine of SAVIGNY 107 § 354 in an influential provision of the Chilean Civil Code art. 68: mere residence replaces civil domicil with respect to persons not domiciled elsewhere.

⁴⁰ Text of 1889, art. 9, which is not really contrary to art. 5, as has been claimed; text of 1940, art. 5, 2° - 4°.

The Argentine C.C. arts. 89, 96, resorts to the domicil of origin, and art. 98 declares that the last known domicil prevails when no new domicil is known; but art. 90, 5°, provides for a legal domicil as the place of actual residence for transients as well as for persons having no known domicil.

⁴¹ Art. 26.

⁴² Decreto-Lei n. 4.657 of 1942, Lei de Introdução, art. 7 § 8.

direction by the Italian patriot, Mancini. In a famous lecture, delivered in Turin in 1851, he proclaimed that a person should be subject in all respects affecting his personality to the law of his nation. The Italian Civil Code adopted this doctrine, referring the concept of nationality to political allegiance to a given state and extending the sphere of the personal law from problems of "status and capacity," to which it was applied in France, to the whole law of family relations.

In this way, the notion that an individual's private rights should be determined not by his physical location but by his political allegiance, owes its origin to the awareness of national identity that was born in the French Revolution and strengthened in the Italian struggle for national unity. With the expansion of political nationalism, the idea that each country should determine the legal status of its subjects, admitting the analogous claims of other states, expanded likewise and has been adopted in the following countries:

France and French colonies: C.C. art. 3 par. 3.

Italy and Italian colonies: C.C. (1865) Disp. Prel. art. 6;
C.C. (1938) Disp. Prel. art. 7 par. 1; C.C. (1942)
Disp. Prel. art. 17 par. 1.

Belgium: C.C. art. 3 par. 3.

Luxemburg: C.C. art. 3 par. 3.

Monaco: C.C. art. 3 par. 3.

The Netherlands: Law of May 15, 1829, arts. 6, 9; H. R. (Jan. 5, 1917) W.10073, N.J. (1917) 143; Hof Amsterdam (June 6, 1919) W.10444, N.J. (1919) 1032. Neth. Indies: Law of April 30, 1847, April 6, 1915, art. 16. Surinam: Law of Sept. 4, 1868, art. 7.

Rumania: C.C. art. 2; for foreigners, App. Bucarest (May 9, 1901) Sirey 1904, 4.21 (with note by the procurator of the government at the court of cassation); Plastara, 7 Répert. 62 nos. 141, 143.

Bulgaria: Court decisions, see Ghénov, 6 Répert. 189 nos. 47, 51.

Finland: Law no. 379 of Dec. 5, 1929.

Germany: E.G. BGB. arts. 7, 9, 13-15, 17-25.

Greece: C.C. (1940) art. 4.

Hungary: Customary law, *cf.* Szladits in 23 Grotius Soc. 1937, 27; von Szászy, 11 Z.ausl.PR. (1937) 169.

Liechtenstein: P.G.R. art. 23.

Montenegro: C.C. art. 788.

Poland: Law of Aug. 2, 1926, art. 1 par. 1.

Portugal: C.C. arts. 24, 27.

Spain: C.C. art. 9; for foreigners *cf.* Trías de Bes 66; Lasala Llana 20-22, and decisions cited.

Sweden: Law of July 8, 1904: amendment of June 27, 1924.

Turkey: Law of March 1, 1915 for foreigners: for Turks abroad see Salem, 7 Répert. 261 no. 199.

Iran: C.C. art. 962.

China: Law of Aug. 5, 1918, art. 5.

Japan: Law of June 15, 1898, art. 3.

Costa Rica: C.C. art. 3.

Cuba: C.C. art. 9.

Dominican Rep.: C.C. art. 3 par. 3.⁴⁸

Ecuador: C.C. art. 14.

Haiti: C.C. art. 7.

Honduras: C.C. art. 13.

Mexico: former C.C. (1884) art. 12. See pages 117-118, *infra*.

Panama: C.C. art. 5a.

Venezuela: C.C. art. 9.

Treaty: Colombia-Ecuador of June 18, 1903, art. 2.

⁴⁸ See the reservation no. 1 of the Dominican delegation to their signature to the Código Bustamante, 86 League of Nations Treaty Series (1929) No. 1950, 240, 241, 376.

The nationality principle was also adopted in the Hague Conventions of 1902 and 1905,⁴⁴ and formed the base of the Treaty of Lima, 1878. In the Treaty of Montevideo, on the other hand, the domiciliary law was preferred. During the preparation of the *Código Bustamante*, vigorous efforts were made to overcome the cleavage dividing the American nations with respect to the test of personal law, but unfortunately without success.⁴⁵ Article 7 of the *Código* declares that

“Each contracting state shall apply as personal law the law of the domicil or the law of the nationality or that which its domestic legislation may have prescribed, or may hereafter prescribe.”

Hence, no unified rule whatever has come into existence.

3. Mixed Systems

Switzerland. Switzerland⁴⁶ applies Swiss private law to foreigners domiciled in Switzerland and prescribes that a Swiss national abroad shall be governed by the law of his domicil. If, however, the state of the foreign domicil does not subject the Swiss national to its municipal legislation, then the Swiss courts have to resort to the law of the canton of which he is a citizen. This proviso applies, for instance, to Swiss nationals domiciled in France, Germany, or Italy, all of which follow the system of national law.

In this way, conflicts with the law of the domicil are avoided, the Swiss law being resorted to only where it is also applied by the courts of the domicil. Following this approach of the Swiss law, the German courts are now in agreement that a Swiss citizen domiciled in Germany is to be judged according

⁴⁴ It also was adopted for the Egyptian Mixed Tribunals in their Regulations of Judicial Organisation, art. 29.

⁴⁵ See BUSTAMANTE, La commission des jurisconsultes de Rio 213ff.

⁴⁶ NAG. arts. 2 and 28. Capacity to contract, however, is excepted from the rule stated in the text and is subjected to the principle of nationality; see below, p. 185.

to Swiss law and that Swiss law ought not to be interpreted as containing a renvoi to the law of the domicil.⁴⁷

Austria. The draftsmen of the Austrian Civil Code of 1811 probably intended that the law of the domicil, either of choice or of origin, should be applied to foreigners whether living in Austria or abroad.⁴⁸ The relevant section of the Code⁴⁹ was so badly drafted, however, that its meaning was never quite certain. While the older annotators regarded the provision as establishing the domiciliary test,⁵⁰ authors and courts of the nineteenth century came to look upon it as a full-fledged adoption of the principle of nationality.⁵¹ This development was motivated not only by the general trend of the period but also by the provision which the Code had established for Austrians living abroad. Under this provision, not all private affairs of such citizens were subject to Austrian law, but only acts and contracts of Austrians occurring abroad, to the extent that the Austrian law limits personal capacity to undertake such acts and contracts and these acts and contracts are intended to produce legal effects in Austrian territories.⁵²

Most annotators were inclined to regard this provision as a general adoption of the principle of nationality so far as Austrians were concerned and to neglect the limitations expressed in the text.⁵³ The Supreme Court, however, following a

⁴⁷ See the following Swiss authors: STAUFFER, NAG. art. 28 no. 3; BECK, NAG., 141 no. 36.

In Germany: RG. (Oct. 26, 1912) Warn. Rspr. 1913 no. 37; RG. (Nov. 8, 1922) 105 RGZ. 340; Bay. ObLG. (Oct. 12, 1917) 35 ROLG. 380, cf. MELCHIOR 224 § 150; RAAPE 750.

⁴⁸ In the case of a person having no domicil at the relevant moment, presumably the law of his domicil of origin was intended to be applied.

⁴⁹ Allg. BGB. § 34.

⁵⁰ SAVIGNY § 363 II; UNGER, 1 System 164; for further citations see WALKER 92 n. 19.

⁵¹ RANDA in 6 Grünhut's Z. (1879) 785; KRASNOPOLSKI in 25 Geller's Zentralblatt (1907) 108; STEINLECHNER in 2 Festschrift zur Jahrhundertfeier des Allg. BGB. (1911) 65; WALKER 93 and n. 24.

⁵² Allg. BGB. § 4.

⁵³ See WALKER 91 n. 16; 1 EHRENZWEIG-KRAINZ (1925) 94 calls the restriction superfluous.

theory which had been established by an ingenious author,⁵⁴ imbued the limitations with new life by holding that the numerous peculiar restrictions of Austrian marriage law would not be applied to an Austrian marrying abroad and not intending at the time of such marriage to live in Austria.⁵⁵ This decision has been criticized as opening the door to law evasion.⁵⁶

Latin America. However, the ideas underlying the provision of the Austrian Code appeared so reasonable to Andrés Bello, the draftsman of the Chilean Civil Code of 1855, that he adopted it, in a modified form, for his own country.⁵⁷ His example has been followed in several other Latin American countries, where the Austrian rule has been adopted in combination with varying systems.

Under the Chilean Code, every inhabitant of the country, even though he may not be a citizen or a domiciliary, technically speaking, is declared subject to the law of Chile.⁵⁸ Similar provisions, with or without textual modification, have been included in the laws of Colombia,⁵⁹ Ecuador,⁶⁰ Mexico,^{60a} El Salvador,⁶¹ and Uruguay.⁶² The provision in itself has been vigorously criticized⁶³ and seems to have been made the object of a diplomatic exchange of notes between Chile and

⁵⁴ MAX BURCKHARD, 2 *System des Oesterreichischen Privatrechtes* (1884) 223.

⁵⁵ OGH. (May 24, 1907) 10 GIU. NF. no. 3787, 8 Amtl.S. NF. no. 1007, Spruchrepertorium (Collection of binding precedents) no. 198; cf. WALKER 91, 622; see below, p. 283.

⁵⁶ PERROUD, Clunet 1922, 5; WALKER 625.

⁵⁷ BELLO's notes, which indicate that he was influenced by the Austrian law as well as by the French Code, are referred to by 1 RESTREPO HERNÁNDEZ 93 no. 148.

⁵⁸ Chile: C. C. art. 14.

⁵⁹ Colombia: Law no. 145 of 1888, art. 9; Law no. 149 of 1888, art. 59.

⁶⁰ Ecuador: C. C. art. 13.

^{60a} Mexico: C. C. art. 12.

⁶¹ El Salvador: C. C. art. 14.

⁶² Uruguay: C. C. art. 3.

⁶³ Cf. CHAMPEAU (respecting Colombia) Clunet 1894, 932; BORJA, 1 Estudios sobre el código civil chileno (1899) 211-213; URIBE (regarding Colombia) Revue 1911, 322.

France.⁶⁴ On the other hand, each of these legislations declares the national law applicable to a national living abroad: first, as concerns his capacity to engage in "certain transactions" producing effects in his own country; and, second, with respect to his family relations.⁶⁵ This combination of domiciliary and national law⁶⁶ has already been noticed as anomalous.⁶⁷ The interpretation of these provisions necessarily must cause difficulties; in fact, in Colombia⁶⁸ efforts looking to a reasonable interpretation have been made, and recently, after thorough consideration, the commission for reform of the Civil Code has proposed that the entire system be replaced by the simple law of domicil.⁶⁹

In addition, Costa Rica has adopted the principle of nationality, but prescribes that foreigners are governed by the law of Costa Rica when they act in that country or if their contracts are made and are to be performed therein.⁷⁰ This provision has been superadded to the others in the Civil Code of El Salvador.⁷¹

Contrary to their Austrian prototype, which, at least in the last period of the Austrian law, was used to mitigate the effects

⁶⁴ WEISS, 3 *Traité* 255 mentions a diplomatic note of August 20, 1882, in which the Chilean minister, Verga, refers to a restrictive interpretation of art. 14. Apparently, the French Government had protested against the application of Chilean law to French citizens living in Chile. It has not been possible to ascertain whether any practical results ever came from this correspondence.

⁶⁵ Chile: C. C. art. 15. No provision in Mexico, but see former C. C. (1884) art. 12.

Colombia: C. C. art. 19.

Ecuador: C. C. art. 14.

El Salvador: C. C. art. 15.

Uruguay: C. C. art. 4.

⁶⁶ MATOS 277 no. 175; SALAZAR FLOR 483.

⁶⁷ BORJA, *op. cit. supra* n. 63 at 213; 1 RESTREPO HERNÁNDEZ 93 no. 149; SOTO's observations in: Colombia, Comisión de Reforma del Código Civil 1939-1940, 92, 98 *inter alia*. The present system on that occasion was defended by ZULETA ANGEL (*ibid.*) and JULLIOT DE LA MORANDIÈRE of Paris (*ibid.* 116).

⁶⁸ See 1 RESTREPO HERNÁNDEZ 93ff. nos. 149-159.

⁶⁹ Art. 36 of the Draft on formation, promulgation, effects, interpretations and derogation of the laws, Comisión de Reforma del Código Civil *op. cit. supra* n. 67.

⁷⁰ Costa Rica: C. C. art. 3.

⁷¹ El Salvador: C. C. 1912, art. 16 par. 3.

of the principle of nationality, these various Latin American countries expand their own national law beyond the limits of the basic principle which they have adopted. These sophisticated modern endeavors are quite in line with recent European, especially French,⁷² tendencies, claiming application of the domestic law to nationals living abroad as well as to foreigners domiciled within the forum. The principles of nationality and of domicil are thus inconsistently combined.

A final stage of this unfortunate development has been reached at present in the Civil Code of Peru of 1936.⁷³ This Code generally adopts the law of domicil⁷⁴ to govern all foreigners whether domiciled abroad or in Peru. Nevertheless, the Peruvian law on status and capacity extends without any limitations to all Peruvians living abroad.⁷⁵ The Venezuelan Civil Code of 1942 follows this model.⁷⁶ The same excessive claim has been made with respect to marriage in the recent Civil Code of Latvia.⁷⁷

A similar conception is said to control the problems of capacity for contracting in the Soviet Union; everybody in Soviet Russia and every Russian abroad is subject to Soviet Russian law. However, this is not deemed to concern the

⁷² See *infra* p. 152.

⁷³ A complete history of the matter is given by LUIS ALVARADO, *Apuntes de derecho internacional* (Lima, 1940) 43-73.

⁷⁴ A. GUSTAVO CORNEJO, 1 *Código Civil* (1937) 50 no. 49 points out that the reference to the law of domicil is intended to include the conflicts norm of the domicil (as in Switzerland).

⁷⁵ C. C. (1936) Tit. Prel. art. V par. 1. For this reason, the Peruvian delegation appointed to revise the Montevideo Treaties declared, in a reservation to the text of 1940 on international civil law, that the provisions therein respecting status and capacity should be understood not to affect the provisions of the Peruvian national law applicable to Peruvians. Cf. RABEL, "The Revision of the Treaties of Montevideo on the Law of Conflicts," 39 *Mich. L. Rev.* (1941) 517, 521. At the same time, under the original treaty provisions actually in force, the new code is inapplicable to Peruvians domiciled in Argentina, Bolivia, Paraguay and Uruguay; cf. ALVARADO, *op. cit. supra* n. 73 at 71. Previously the Peruvian Code of Civil Procedure, art. 1158, had reserved the exclusive jurisdiction of the Peruvian courts over all questions of status, capacity and family relations as regards Peruvians domiciled at any place and foreigners domiciled in Peru; cf. ROGER, 7 *Répert.* 30 no. 49.

⁷⁶ Venezuela: C. C. (1942) arts. 8 and 9.

⁷⁷ Latvian C. C. § 11; cf. SCHILLING, 4 *Z. osteurop. R.* (1937) 226, 229.

general capacity of having rights, which seems "not to be considered by the Soviet law as a faculty inherent to man as such."⁷⁸

III. SUPPLEMENTARY RULES

The principle of nationality cannot be applied to persons who are not nationals of any country, and it causes difficulties in its applications to persons who are nationals of more than one country. For both types of cases, the principle of nationality must be supplemented by special rules.

1. Multiple Nationality

In matters of status, a person who is simultaneously a national of the state of the forum and of some other state is usually considered by the forum as exclusively its own national, his additional foreign nationality being disregarded. This approach has been traditionally followed in France, Great Britain, Switzerland, Belgium, and Luxemburg⁷⁹ and has been adopted more recently by statutes in Japan and Liechtenstein, and by the courts of Germany and of other countries.⁸⁰ The Convention on Conflict of Nationality Laws (art. 3) has recognized the right of a state to apply its law in such cases.

Where, on the other hand, a person is a national of two or more countries but the litigation arises in a third country, the law most consistently applied is that of the country of which the person is not only a national but where he also has his domicile or habitual residence or, in the absence thereof, his

⁷⁸ See MAKAROV, *Précis* 175 and 192.

⁷⁹ Surveys by KAHN, 1 *Abhandl.* 59, also in 30 *Jherings Jahrb.* (1891) 68; MAURY in 9 *Répert.* 297 no. 113.

⁸⁰ Japan: Law of 1898, art. 27 par. 1.

Liechtenstein: P.G.R. art. 30 par. 1.

To the same effect Brazil: Former introd. art. 9 par. 2.

Germany: RG. (Jan. 24, 1908) 18 *Z.int.R.* 533, 539; RG. (March 13, 1924) *Leipz.Z.* 1924, 741; RG. (Nov. 5, 1928) 43 *Z.int.R.* (1930-1931) 86, *IPRspr.* 1929, no. 1.

residence.⁸¹ This view was approved by the Sixth Conference on International Private Law held at the Hague in 1928, which formulated corresponding provisions to complement the older Hague treaties on international family law;⁸² eliminating reference to domicile, the test is "habitual residence" and, in its absence, simply the "residence" at the time decisive for the particular purpose, for instance, when the personal capacity to marry is in question, the moment of the marriage ceremony.

Another solution has been essayed by Japan,⁸³ and still others have been suggested.⁸⁴ For the purposes of public international law, it has long been a well-recognized tendency to prefer among several nationalities of a person that which in a given case appears the most "effective" one.⁸⁵ This principle has been formulated by the Hague Convention on Conflict of Nationality Laws of 1930, as follows:

"Within a third State, a person having more than one nationality shall be treated as if he had only one. Without prejudice to the application of its law in matters of personal status and of any conventions in force, a third State shall, of the nationalities which any such person possesses, recognize ex-

⁸¹ Institut de Droit International, Resolution of Oslo 1932, art. 2, *Annuaire* 1932, 471 (résidence habituelle et principale).

Brazil: C. C. Former introd. art. 9 (domicil, residence).

Liechtenstein: P.G.R. art. 30 par. 2 (domicil, residence, last acquired citizenship).

Cf. for Spain: TRÍAS DE BES in 6 *Répert.* 247 no. 78; for Hungary: SZÁSZY in 11 *Zausl.PR.* (1937) 170 (domicil). On other theories, see 2 *ARMINJON* (ed. 2) 34ff. no. 10 *bis*.

⁸² See the list of the various supplementary clauses in MAKAROV 421 VIII la. The Hague Convention of 1930 on Conflicts of Nationality Laws, art. 5 (HUDSON, 5 *Int. Leg.* 359, also in 24 *Am. J. Int. Supp.* (1930) 192) declares not to prejudice the matters of personal status.

⁸³ Law of 1898, art. 27 (law of the last acquired nationality).

Similarly, Thailand: Act on Conflict of Laws of March 10, 1939 (B.E. 2481) s. 6 par. 1, see LEWALD, *Règles générales des conflits de lois*, no. 42 n. 8 at 102; cf. 1 *BAR* § 88 at 261, tr. by GILLESPIE at 194.

⁸⁴ See Trib. civ. Bruxelles (May 29, 1934.) Clunet 1937, 570 and comment.

⁸⁵ Greece: C.C. art. 31 par. 2; see FLOURNOY, "Dual Nationality and Election," 30 *Yale L. J.* (1921) 693; MAURY, 9 *Répert.* 298 no. 114.

clusively in its territory either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected.”⁸⁶

2. Stateless Persons

A person not being a national of any country is called an *apatride* or *apolide* or *heimatlos*.⁸⁷ Such a situation could arise under ordinary international circumstances, where a child of parents whose home country adheres to the pure principle of *jus soli*, was born in a country in which the *jus sanguinis* was in force. The recent unrest of legislation respecting married women has engendered other cases. Thus, where a Swiss woman marrying a Frenchman fails to sign a declaration of intention to acquire French citizenship, under article 19 of a French law of November 12, 1938, she does not acquire French nationality, though not retaining her former citizenship.⁸⁸ Untold numbers of individuals have also been rendered stateless by the political events of this century. Many thousands of emigrants have lost their nationality by Soviet decree and many more by the ruthless legislations of Italy and Germany, introducing the system of “expatriation” as a political measure against real or alleged political enemies. Furthermore, the peace treaties following World War I and later events have made it frequently impossible in fact to ascertain the nationality of a person, who in such a case must practically be treated as an *apatride*, as is done in the case of gypsies.⁸⁹

At present, individuals lacking a definite nationality are generally subject to the law of their domicil or habitual resi-

⁸⁶ Art. 5.

⁸⁷ This German expression is used by French and other writers, while the official German term is “staatenlos.”

⁸⁸ Swiss Department of Justice, BBl. 1939 II, 284 no. 14. This case would not arise under art. 8 of the 1930 Convention on Conflicts of Nationality Laws which Switzerland did not ratify.

⁸⁹ Poland: Law of 1926, art. 1 par. 1.

Hungary: Law XXXI of 1894 (Marriage Law) § 119.

Liechtenstein: P.G.R. art. 31 par. 1.

dence, and, in default thereof, to the law of their temporary residence. This has been the view of the Institute of International Law since 1880.⁹⁰ Most countries accede to this position.⁹¹ It was also adopted by the Sixth Conference on International Private Law at the Hague in 1928⁹² in the complementary drafts just mentioned, in which, as in all recent treaties, the term "domicil" is abandoned in favor of "habitual residence" or, in its absence, "residence." The new Italian Code has intentionally chosen the test of residence.⁹³

Another solution was formerly adopted by the German Civil Code (EG. art. 29), providing that a person who had once held but subsequently lost the nationality of a country without acquiring another, was declared to remain subject to his former

⁹⁰ Institut de Droit International: Resolution of Oxford, art. 6 pars. 2 and 5, *Annuaire* 1881-1882, 57; Resolution of Oslo, art. 3, *Annuaire* 1932, 471, 472. Unfortunately the Institute has changed its attitude in a Resolution on "Statut juridique des apatrides et des réfugiés" voted in Brussels in 1936, *Annuaire* 1936, II 292. Art. 4 provides that the law applicable in the case of a stateless person will be that of the country either of a nationality possessed previously or of his domicil or, in the absence of either, of his habitual residence at the date regarded as relevant by the court.

⁹¹ Belgium: POULLET 307 no. 255; Congo: Decree of Feb. 20, 1891, art. 8 (for foreigners domiciled in Congo).

France: Trib. civ. Nantes (Nov. 28, 1901) *Clunet* 1902, 590; Trib. civ. Seine (Feb. 14, 1908) *Revue* 1910, 112; Cour Paris (Nov. 25, 1913) *Revue* 1914, 130; App. Nancy (June 10, 1914) *Clunet* 1915, 620, *Revue* 1914, 579; French Morocco: Law of 1913, art. 5 (for foreigners domiciled in Morocco).

Hungary: Marriage Law of 1894, § 119.

Italy: C. C. (1942) Disp. Prel. art. 29 (residence). Previously the law of June 13, 1912 on nationality, art. 14, subjected the *apolidi* residing in Italy to Italian civil law, but for other *apatrides* there was controversy, although residence was the test most frequently adopted. See UDINA, *Elementi* 122. The new code substitutes domicil as the test.

Liechtenstein: P.G.R. art. 31 par. 2.

The Netherlands: KOSTERS 289 (domicil).

Poland: Law of 1926, art. 1 par. 1.

Rumania: 7 *Répert.* 63 no. 151.

Switzerland: NAG. art. 7a.

Japan: Law of 1898, art. 27 par. 2.

China: Law of 1918, art. 2 par. 2.

Brazil: C. C. Former introd. art. 9.

Cf. TRACHTENBERG, "Heimatlose-Heimatlosat," 8 *Répert.* 565 no. 72 *et seq.*; MELCHIOR 449 n. 1.

⁹² Cf. MAKAROV 421 VIII 1 b.

⁹³ Italian C. C. (1938) Disp. Prel. art. 19; cf. *Relazione* 1938, no. 15; C. C. (1942) Disp. Prel. art. 29.

national law. This provision compelled the German courts to decide the private status and the incidents of family relations of Russian *émigrés* in accordance with the legislation of the Soviet Union, i.e., the country which was their very enemy and which had refused to accept the role of successor to the former Russian Empire.⁹⁴ With respect to succession upon death, the situation between Germany and Russia was at first remedied by a treaty.⁹⁵ Recently, however, Germany has adhered, by a new law, to the rule proposed by the Sixth Conference at the Hague.⁹⁶

In addition, two multipartite treaties of 1933 and 1936 on the status of refugees (the one treaty, in case they have no nationality, the other irrespective of nationality), determine the personal law of refugees by the law of the country of domicil or, in default thereof, by that of the country of residence.⁹⁷

The test of domicil or residence has thus proved to be indispensable in important cases.

3. Nationals of Countries with a Composite System of Private Law

Composite law on personal basis. In Algeria, Tunisia, Syria, Egypt, Iran, India, China, and other Eastern countries, per-

⁹⁴ RG. (Oct. 6, 1927) Warn. Rspr. 1928, no. 13, IPRspr. 1928, no. 22.

⁹⁵ German Law of Jan. 6, 1926, on the German-Russian Treaties of Oct. 12, 1925 (based on the "Rapallo" Treaties of 1922) RGBl. 1926 II 1, art. 4.

⁹⁶ German Law of April 12, 1938 (RGBl. 1938 I 380) art. 7, altering the text of EG. art. 29, states that insofar as the laws of the state to which a person belongs are declared decisive, the legal relations of a person without nationality are to be decided according to the laws of the state in which he has, or if the decisive moment lies in the past, had at the moment, his habitual residence, or, in the case of lack of habitual residence, his residence.

Cf. a comment by VON STACKELBERG, 12 Zausl.PR. (1938) 66. The "motives" of this legislation explain that Germany accepts the generally adopted principle in the form proposed by the Sixth Hague Conference, which now governs the personal law so far as it goes, while other matters remain subject to their own special rules, as e.g., C. Civ. Proc. § 114 par. 2.

⁹⁷ Convention relating to the International Status of Refugees, Geneva, Oct. 28, 1933, arts. 4, 5 in 159 League of Nations Treaty Series (1935-1936) 199, 6 HUDSON, Int. Legislation 483ff. No. 350; Provisional Arrangement concerning the Status of Refugees Coming from Germany, Geneva, July 4, 1936,

sonal status is determined by religion, class, or race.⁹⁸ In India, for instance, the law is different for Buddhists, Hindus, Mohammedans, and whites, although it is in every case a "law of the forum."⁹⁹ Some elements of this system also survive in Eastern European countries.

Such diversity of personal law is a part of the substantive law of the country concerned. When a conflicts rule refers to the "law" of such a country, either because it is the law of the domicile of an individual or because it is his national law, no uniform law being in force in any part of the country, the reference can only be to the particular set of rules that governs the group of persons to which the individual belongs.¹⁰⁰ Under this approach, it is obvious that the conflicts rule is quite sufficient in itself and that it does not need any additional rules, complementary to those which invoke the law of domicile or nationality.

Difficulties may arise, it is true, from the fact that the regulation of interreligious or interracial relations in the oriental countries concerned is often so obscure and incomplete that it may not be easy for a foreign judge to cope with their ascertainment and application.¹⁰¹

arts. 5, 6, in 171 *League of Nations Treaty Series* 75, 7 HUDSON, *Int. Legislation* 376 No. 448.

⁹⁸ Cf. on Egypt and other Islamic countries: ARMINJON, in *Clunet* 1912, 698, 1025; *Clunet* 1913, 34, 435, 812; and 1 *Précis* 102. On Palestine, Trans-Jordan, Cyprus, Syria and Iraq: GOADBY 79, 107, 142; WENGLER, *Internationales und interreligiöses Privatrecht in Palästina*, 12 *Zausl.PR.* (1939) 772-808. On Hindus in Zanzibar before the British courts: HUGH E. KINGDON, *The Conflict of Laws in Zanzibar* (1940) 15. On the Belgian Congo: MAURICE VERSTRAËTE, "Intergentiel Recht," 9 *Rechtsk. Wkbl.* 1940, col. 1169. On the Netherlands Indies: KOLLEWIJN, "Interracial Private Laws," in *The Effect of Western Influence on Native Civilizations in the Malay Archipelago*, edited by SCHRIEKE (Batavia, 1929) 204.

⁹⁹ On the contrary, in an Indian court a Chinese Buddhist custom is foreign law. See the careful judgment by Sir George Rankin in *Tan Ma Shwe Zin v. Khoo Soo Chong* [1939] A. C. 527 (Privy Council). Cf. *Casdagli v. Casdagli* [1918] P.(C.A.) 89 at 110, per Scrutton, L. J.; and, in general, ARMINJON, *Clunet* 1913, 39.

¹⁰⁰ GRASSETTI, 5 *Rivista Dir. Priv.* (1935) II 10.

¹⁰¹ See for Palestine: GOADBY 119; For Latvia (where classes are distinguished): BERENT in 4 *Leske-Loewenfeld* I 577; For Bulgaria: DANEFF, 38 *Bull. Inst. Int.* (1938).

*Composite law on territorial basis.*¹⁰² As contrasted with the grouping of population according to personal qualifications, the law of conflicts is directly affected when the law of a country to which a conflicts rule refers is split into territorially different systems. A composite system of law on a territorial basis makes nationality an incomplete criterion. The United States, the British Empire, Poland, Rumania, Yugoslavia, and Mexico are examples of political units lacking a unified law on personal status; their territories are divided into parts where different bodies of rules are in force. A court which has to apply the "Polish law" relative to a Polish subject's capacity to marry, would be unable to find an appropriate set of rules, except by locating such person in the former Prussian or former Russo-Polish or old-Russian or Austrian or Hungarian part of Poland. A secondary rule of conflicts is necessary.

First case: Where interregional rules exist.

If the country to whose law reference is made possesses a unified internal regulation declaring which one of the several private laws applies to the individual concerned, this regulation is universally accepted for the purpose of secondary reference. For instance, the Polish law of "internal relations" (interlocal private law), enacted simultaneously with the Polish law on international private law, August 2, 1926,¹⁰³

¹⁰² Cf. 1 ZITELMANN 403; RAAPE 29 and 1 D.IPR. 94; WALKER 104; MELCHIOR 451 § 310; DE NOVA, in 30 Rivista (1938) 388 and Il richiamo di ordinamenti plurilegislativi: Studio di diritto interlocale ed internazionale privato (1940) (not available); GRASSETTI, 5 Rivista Dir. Priv. (1935) II 3; 1 STREIT-VALLINDAS §§ 16, 17 (the best survey of facts and literature); CHESHIRE 161; FALCONBRIDGE, "Renvoi and the Law of the Domicile," 19 Can. Bar Rev. (1941) 311. The aggrandizement of Germany caused problems in view of which the doctrine of interregional law has been discussed again; see quotations by DE NOVA, 15 Annuario Dir. Comp. (1941) 338, 339. See furthermore the Swiss NAG. in its original main application to intercantonal conflicts and the French law of July 24, 1921 concerning the conflicts between the French and the local law of Alsace-Lorraine.

¹⁰³ Arts. 1 and 3. Another example is art. 14 of the Spanish Civil Code, providing that the conflicts rules established with respect to the persons, the transactions and the property of Spaniards abroad and of foreigners in Spain are applicable to the persons, transactions and property of Spaniards in territories or provinces of different civil legislations; see BEATO SALA, 1 Revista Der. Priv. (1913-1914) 201; TRÍAS DE BES, 6 Répert. 266 no. 165.

provided that the status and the capacity of an individual of Polish nationality, domiciled abroad, is to be determined by Polish courts in the first instance under the law of the last domicile he had in Poland and, in the second, under the law of the Polish capital. Accordingly, German, French, Italian, etc., courts apply the same expedients. This method was recommended by the Institute of International Law¹⁰⁴ and has been adopted in several statutory enactments.¹⁰⁵

It is easily understandable that a foreign court looking for the "national law" of an individual, should adopt the localizations effected by the sovereign of the foreign nation. But the theoretical background of this operation has been a subject of discussion. An essential resemblance between interregional and international private laws cannot be denied; both are types of conflicts rules. Yet the reference leading from the conflicts rules of the forum through the interprovincial rule to a particular family law of a territory must not be treated as identical with a regular *renvoi*; the foreign interregional rule is not in competition with the forum's own conflicts rules.¹⁰⁶ As a matter of fact, the strongest adversaries of *renvoi* agree with this use of foreign interregional statutes.¹⁰⁷

It must be presumed that the interlocal rules are to be adopted with all their characteristics, e.g., what they understand as "domicil," the domicile concept of the forum being immaterial. Also, such particular notions must be applied as the Swiss cantonal citizenship¹⁰⁸ or the "town settlement"

¹⁰⁴ Resolutions passed at Oxford, 1880, art. 3 par. 3, *Annuaire* 1881-1882, 57.

¹⁰⁵ Sweden: *Int. Fam. L.* of 1904 with amendments, c. 6 § 1.

Japan: *Law* of 1898, art. 27 par. 3.

China: *Law* of 1918, art. 2 par. 3.

¹⁰⁶ Cf. RAAPE 34 against 1 ZITELMANN 398 and NIBOYET 493 no. 411; GRASSETTI, 5 *Rivista Dir. Priv.* (1935) II 4, against other Italian writers; and see the survey by 1 STREIT-VALLINDAS 354.

¹⁰⁷ NIBOYET, *op. cit. supra* n. 106; LEWALD, 29 *Recueil* 1929 IV 590; see RAAPE 34.

¹⁰⁸ "Heimat," is still important for the matters of cantonal legislation that have not been unified.

(*Heimatzuständigkeit*)¹⁰⁹ which was a basic concept in the Austro-Hungarian monarchy and remained in force in the successor states.¹¹⁰ In Hungary it was abolished but recently.¹¹¹

Second case: Where no interregional rules exist and the individual is domiciled within his national country.

Most countries that have no uniform private law also lack a unified set of interlocal rules. Such a situation existed in Germany before the Civil Code took effect on January 1, 1900, and after World War I the same was true in all countries that had annexed new provinces and in which legal unification was not yet achieved. Yugoslavia and perhaps Rumania are still in this situation. But the foremost examples are presented by the British Empire and the United States. With respect to the former, it is hardly doubtful that "there is in fact no system of conflict of law common to all parts of the British Empire,"¹¹² that would enable a foreign court to discover all-British rules connecting British subjects with their several jurisdictions. Neither is it permissible to apply the English rules on conflicts or on the law of status to all British subjects, for the English law cannot be construed as "the true national law" of all British subjects.¹¹³ Perhaps in the future, some

¹⁰⁹ The French text of the Treaty of St. Germain of Sept. 10, 1919, art. 3 uses the term "indigénat" with the Italian equivalent "pertinenza" in parentheses. The German translation in the Austrian Staatsgesetzblatt 1920, at 1048 is "Heimatrecht". The English version "citizenship" as published in British and Foreign State Papers (1919) 505, is wrong.

¹¹⁰ See e.g., for parts of Yugoslavia, PÉRITCH in 4 Leske-Loewenfeld I 879 n. 15 and LOVRIČ, *ibid.* 1038 n. 172 (Croatia-Slovenia). See also PÉRITCH, 32 Bull. Inst. Int. (1935) 3.

For Czechoslovakia, HOCHBERGER, 4 Z. osteurop. R. (1938) 621, 629 reports that Czechoslovakian nationals domiciled in Czechoslovakia are considered having the capacity of their domiciliary law, but if domiciled abroad, that of the law of their township.

¹¹¹ In Hungary it has been replaced by domicile for interlocal purposes by Law XIII of 1939; cf. 13 Z. ausl. PR. (1940) 258, 259.

¹¹² FALCONBRIDGE, 19 Can. Bar Rev. (1941) 322, *supra* n. 102.

¹¹³ This was contended by DICEY 873; see *contra*: CHESHIRE 162 n. 4; FALCONBRIDGE, 19 Can. Bar Rev. (1941) 328, *supra* n. 102.

point of localization might be found in local conceptions of nationality, Canadian, South African, etc., which seem to be in a state of development, in addition to the notion of British subject;¹¹⁴ but the new conception of dominion nationality apparently has not yet been taken into consideration for such purpose¹¹⁵ and in any event would not specify the law of one of the several component states or provinces of the dominion in question.

However, unanimity is still to be found in one group of cases, viz., where the individual is domiciled at some place within the entire territory of the country whose legal system is divided, or where, as to matters of inheritance, the individual was there domiciled at the time of his death. The rule is quite generally recognized that the law of such place constitutes his personal law.¹¹⁶ Thus, the principle of domicil has retained a further supplementary hold in Europe.

Although this rule is well settled, it is nevertheless not certain whether it follows that "domicil" is to be defined under

¹¹⁴ See KEITH, *The Dominions as Sovereign States* (1938) 184-199. Cf. EMMETT, "Nationality in the Union of South Africa," 17 *Brit. Year Book Int. Law* (1936) 187; 18 *ibid.* (1937) 181; see also GEY VAN PITTIUS, *Nationality Within the British Commonwealth of Nations* (1930) 223.

¹¹⁵ The problem has scarcely been discussed; in 2 *Encyclopaedia of the Laws of England* (ed. 3, 1938) 467ff. it is observed that at present colonial nationality is not distinguished from the British, although in the future the principles embodied in the Statute of Westminster, 1931 (c. 4) might affect nationality within the Empire.

The latent significance of the new local nationality for the purpose of *jurisdiction*, in particular divorce jurisdiction, has been pointed out by KEITH, "Das Verhältniss des *Statute of Westminster* von 1931 zum internationalen Privatrecht," 6 *Zausl.PR.* (1932) 301, 308 and *op. cit. supra* n. 114 at 193; EASTMAN, "Australian Nationality Legislation, Nationality of Married Women," 18 *Brit. Year Book Int. Law* (1937) 179. A more radical development toward the criterion of local citizenship for personal status might be expected with respect to Eire.

¹¹⁶ 1 ZITELMANN 405 at n. 7; RAAPE 36 (b); MELCHIOR 452 § 311 n. 3.

With respect to their interprovincial rules, the Court of Cassation of Rumania (March 3, 1937) 5 *Z.osteurop.R.* (1939) 654, *Clunet* 1938, 946 held that divorce is governed by the law of the domicil of the parties at the time of the action, not by that of the place of celebration of the marriage nor by that of the origin of the parties, and, therefore, applied the Austrian Civil Code to the divorce of parties domiciled in Bucovina (the actual local law of that province).

the law of the forum and not, as in the first case described (where interlocal rules exist), in accordance with the conceptions existing in the territory where the individual is said to reside.

Third case: Where no interregional rule exists and the individual is domiciled outside his national country.

A troublesome situation arises where there are no interregional rules, and the individual is not domiciled in any part of his national country. Several opinions have been put forward.

(a) The prevailing doctrine in Germany,¹¹⁷ followed by the Swedish legislation,¹¹⁸ applies the law of that district of the national's country where the individual now domiciled abroad had his last domicile¹¹⁹ or, if he never had any domicile in his national country, the law in force at the capital of that country.¹²⁰

This doctrine is satisfactory in certain cases. The connecting factors evidently were borrowed from procedural models;¹²¹ to allow nationals domiciled abroad to sue or be sued locally, jurisdiction, ordinarily based on actual domicile, in emergency cases may be based upon the last previous domicile or, as a final resort, may be assumed by the courts of the capital. Such provisions make sense in the intranational rules of a country like Rumania. Rumanian citizens are not subject to foreign personal laws even when domiciled abroad and therefore must be connected with one of the territorial laws

¹¹⁷ NIEMEYER, *Das IPR. des BGB.* 68; LEWALD 13; RAAPE 36; MELCHIOR 452.

¹¹⁸ Swedish Int. Fam. L. of 1904 with amendments, c. 6 § 1 par. 2; Law of March 5, 1937 on Conflict of Laws in regard to Succession, c.3 § 1. See 11 *Z.ausl.PR.* (1937) 937; 39 *Bull. Inst. Int.* (1938) 158.

¹¹⁹ RG. (Nov. 30, 1906) 64 *RGZ.* 389 at 393; OLG. Karlsruhe (May 6, 1898) 9 *Z.int.R.* (1899) 311, 315.

¹²⁰ KG. (Aug. 20, 1936) JW. 1936, 3582 (Soviet Russian subjects); LG. Hamburg (Sept. 2, 1936) JW. 1936, 3492 (Rumanians).

¹²¹ NIEMEYER, *Das IPR. des BGB.* 68; German Code of Civ. Proc. §§ 15, 27 par. 2, 606 par. 2, 642, 648.

of Rumania. A French or German court, adhering to the same principle of nationality, may very well agree to locate a Rumanian citizen somewhere in Rumania. For analogous purposes, in order to secure Frenchmen living abroad a domicile in France in case they need one, the French private draft of 1930 establishes an artificial domicile: (i) at the Frenchman's last domicile in France, (ii) subsidiarily at his last residence, (iii) otherwise at his birthplace, and (iv) in the last resort at any place chosen by him in a declaration before a French consul.¹²²

On the other hand, such subsidiary rules of the forum are obviously unsuitable for connecting a British subject with a determinate part of the British Empire. As a matter of fact, no German or French court is likely to apply them to a British subject. Where an Englishman is domiciled in France, French courts as well as other Continental courts apply French law, by *renvoi*.

(b) Italian courts reject *renvoi*¹²³ and are confronted with a problem that has been called insoluble. When the Courts of Cassation of Florence and Naples, in leading cases of 1919 and 1920, respectively,¹²⁴ proclaimed the anti-*renvoi* doctrine, they recognized at the same time that the British laws did not contain any rules linking British subjects domiciled abroad with any British legal system. The only possible result was to adopt the law of the domicile of origin.¹²⁵

Thus, the English judgments in the cases of *Johnson* and

¹²² Art. 5 par. 2, 26 Bull. Soc. d'Études Lég. (1930) 176; cf. NIBOYET, 26 *ibid.* 78.

¹²³ This well known rule was stated by Luxmoore, J., *In re Ross*, [1930] 1 Ch. 377, 403. It is expressly confirmed by the Italian Civil Code (1942) Disp. Prel. art. 30.

¹²⁴ Cass. Firenze (July 21, 1919) *Giur. Ital.* 1919 I 1 1040.

¹²⁵ BUZZATI fully approving of the Naples decision, Cass. Napoli (Jan. 5, 1920) *Foro Ital.* 1920 I 348. The same suggestion is made by CHESHIRE, "Decisions of National Tribunals Involving Points of International Law," 12 *Brit. Year Book Int. Law* (1931) 174 at 176, and in his *Private International Law* 161.

O'Keefe,¹²⁶ which in fact (by renvoi) resort to the domicil of origin to determine the distribution of the estates of British subjects who die domiciled in Italy, are not without support in Italian law.

But, of course, it does not correspond to the spirit of British laws that a person firmly settled in Naples for forty-seven years, should be traced back to the origin of his father; at least, even in the eyes of a British court, the domicil of origin of the father of Miss O'Keefe was undoubtedly superseded by the domicil of her choice. For this reason alone the solution of the O'Keefe case is absurd.¹²⁷

(c) Recent Italian writers, with Falconbridge's approval, conclude that it is impossible to fix the status of a British subject living abroad and suggest that the Italian court apply the *lex fori*, viz., Italian municipal law.¹²⁸ Such a gesture of despair seems to be uncalled for, however, if proper regard be paid to the historical development of the personal law; domicil was replaced by nationality in the nineteenth century, but not so as to exclude the test of domicil whenever the new test of political allegiance should fail to operate reasonably. Certainly, reference to domicil is preferable to a resigned resort to the *lex fori*. The practical consequences illustrate what the choice of law means in this case:

Suppose a Canadian dies domiciled in France, and an Italian court has to determine the intestate succession to his movables. If the Italian court were to apply Italian inheritance law *qua lex fori*, instead of French law *qua lex domicilii*, the solution would be senseless and completely destroy harmony between the conflicts rules of the forum and those of the domicil, as

¹²⁶ *In re Johnson, Roberts v. Att. Gen.* [1903] 1 Ch. 821 per Farwell, J.; *In re O'Keefe, Poingdestre v. Sherman* [1940] Ch. 124 per Crossman, J.

¹²⁷ FALCONBRIDGE, 19 Can. Bar Rev. (1941) 324, 326, *supra* n. 102. Another argument is advanced by GRASSETTI, 5 Rivista Dir. Priv. (1935) II 3, 7, *supra* n. 106.

¹²⁸ DE NOVA and GRASSETTI, *supra* n. 102 and FALCONBRIDGE, 19 Can. Bar Rev. (1941) 323, *supra* n. 102.

well as with those of the Canadian courts which seek to follow any solution chosen by the court of the domicile but are unable to follow the law of the forum of a third country.

(d) Zitelmann suggested taking domicile alone as the test.¹²⁹ He would limit the reference to nationality to the case where the actual domicile is situated within the national country. It has been objected that this view runs directly counter to the principle of nationality,¹³⁰ but this argument is evidently wrong. It is true, on the other hand, that the *lex domicilii* and the theory of renvoi result in the same decision in this case and are often hardly distinguishable from each other. But the case of a British subject domiciled in Italy induced the leader of the Italian school of international law and the prominent opponent of renvoi, Dionisio Anzilotti, to abandon his opposition.¹³¹

Adoption of the law of domicile by the Italian courts, either as an independent secondary test or, more appropriately, as the result of renvoi, is the only way leading out of the impasse. Renvoi is the better method, since harmony is preserved with the British rules, especially in relation to the definition of domicile. One cannot reject renvoi and hope for anything tolerable.

It has been observed that the law of domicile has not the same domain of application in all British countries.¹³² This, however, involves only special points immaterial for the general rule.

¹²⁹ 1 ZITELMANN 405, followed by WALKER 105 n. 57.

¹³⁰ RAAPE 37.

¹³¹ ANZILOTTI, in approving notes to Trib. Firenze (Jan. 23, 1918) in 12 Rivista (1918) 81 and App. Firenze (Jan. 23, 1919) in the same cause, *ibid.* 288. The judgments were reversed by Cass. Firenze, *supra* n. 124.

¹³² FALCONBRIDGE, 19 Can. Bar Rev. (1941) 322, *supra* n. 102. His example, however, that under the primary rule in Quebec the *lex loci actus*, not the *lex domicilii*, governs the formal validity of a will, is not entirely relevant, since in this situation the law at the place of contracting is recognized—alone or optionally—by the Continental conflicts rules, and to such extent no renvoi problem is involved.

(e) The problem is not much different with respect to American citizens. If an American citizen is domiciled within a state of the United States, the reference to his "national" private law means the law which will be applied to him by a court sitting at his domicile. It has been properly noted in Europe that in this case the nationality principle needs no supplementary rule, because such domicile constitutes local citizenship in the state.

Where an American citizen is, however, domiciled in a foreign country, *renvoi* has been adopted by numerous European courts upon the erroneous view that the conflicts law of the American state in which he had his last American domicile, referring to the law of his present domicile,¹³³ applies. The conception in this country is that such an individual is still an American citizen but no longer a citizen of a particular state.¹³⁴ Consequently, if there were Federal rules of conflicts, they might appropriately be resorted to in such case by a Continental court. But there are no such rules. Since the Supreme Court's decisions requiring Federal courts in diverse citizenship cases to follow the conflicts rules of the states where they are sitting,¹³⁵ it is doubtful to what extent an independent Federal system of conflicts law can be developed.¹³⁶ However, in the United States, the scope of the law of domicile is substantially more uniform than in the British Commonwealth, with exception only of certain peculiarities in the law of Louisiana. Hence, it seems quite justified¹³⁷ for

¹³³ See the critical exposition by RHEINSTEIN, 1 *Giur. Comp. DIP.* 141.

¹³⁴ See *Prentiss v. Brennan*, 19 *Fed. Cas.* (1851 C.C. N.D. N.Y.) 1278, per Nelson, J.; *Hammerstein v. Lyne* (1912 D.C. W.D. Mo.) 200 *Fed.* 165.

¹³⁵ *Erie Railroad v. Tompkins* (1938) 304 U.S. 64; *Sampson v. Channell* (1940 C.C.A. 1st) 110 F. (2d) 754 and notes in 18 *N.Y.U. L. Q. Rev.* (1940-1941) 119; 128 *A. L. R.* 405; and now especially *Klaxon Co. v. Stentor Electric Mfg. Co.* (1941) 313 U.S. 487 and *Griffin v. McCoach* (1941) 313 U.S. 498.

¹³⁶ *Supra* p. 37.

¹³⁷ Professor Lawrence Preuss has attracted my attention to a somewhat similar problem which has been discussed in matters of extradition. Under the

French, German, Chinese, and other foreign courts to treat the questions that are generally decided in American courts by the municipal law of the domiciliary state, in the same way and under the same construction of domicil.

Conclusion. To summarize, where nationality alone is insufficient for ascertaining the applicable law, resort must be had in the first place to the rules respecting interregional relations of the country whose national the individual is. If no such rules have been established in that country by an authority covering the entire national territory, the spirit in which its courts generally solve the problem of demarcation between the legal systems included may reasonably be followed by foreign courts. Where, as in the United States and in the British Empire, domicil is generally decisive, a court of any other country has good reason to apply the same criterion with all of its implications. Only in the last resort need independent conflicts rules be applied, based on a former domicil of choice or some other contact.

Except for the last point, the attitude of the forum may thus be similar to that observed in dealing with religious, racial, or class differentiations.

treaties, extradition usually depends on the recognition, by both the requesting and the requested countries, of the criminal character of the alleged offense. How is the "principle of double criminality" to apply to the United States where the administration of criminal law has not generally been unified? Is "country" in such case the United States or the state involved? In the case of *Factor v. Laubenheimer and Haggard* (1933) 290 U.S. 276, 28 Am. J. Int. Law (1934) 149, the United States was requested to extradite to England, Factor, who had been found in Illinois. The Supreme Court, by a six to three vote, held it sufficient that the criminal character of the act was recognized in twenty-two states, although not proved to be such in Illinois. (It has even been said that the number, twenty-two, is too high; see HUDSON, "The Factor Case and Double Criminality in Extradition," 28 Am. J. Int. Law (1934) 274, 303 n. 120.) BORCHARD, "The Factor Extradition Case," *ibid.* 744, has given the more cautious explanation that the considerable recognition in American state statutes was evidence of the American recognition of the criminality in question. The dissenting judges and HUDSON, *loc. cit.*, maintain the older conception that the law of the state where the fugitive is finally arrested is decisive. Evidently our own problem is easier to solve.

IV. DETERMINATION OF NATIONALITY AND DOMICIL

1. Determination of Nationality

Whether a person is a national of a certain country is a problem that is determined exclusively by the law of that country,¹³⁸ a settled rule of international law confirmed by the Convention on Conflict of Nationality Laws of 1930.¹³⁹ No other law than that of Brazil determines whether or not a certain individual is a Brazilian national; no other law than that of the United States answers to the question whether an individual is a citizen of the United States. The statement in a former American nationality law that "any American woman marrying an alien shall take the nationality of her husband,"¹⁴⁰ if taken literally, surpassed the powers of the United States.¹⁴¹ The same formula was incorporated, however, in many old European statutes, as for instance, article 19 of the *Code Napoléon*, sometimes interpreted to the effect that the wife should be subject to the personal law of the husband, irrespective of whether she acquired his nationality by the law of his national country.¹⁴²

¹³⁸ See Mr. Justice Gray in *United States v. Wong Kim Ark* (1898) 169 U.S. 649, 668.

¹³⁹ Art. 2: "Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State."

¹⁴⁰ Act of March 2, 1907, ch. 2543, sec. 3, 34 Stat. 1228, repealed by the Cable Act, Sept. 22, 1922, ch. 411, sec. 7, 42 Stat. 1021 and later statutes; cf. 8 U. S. C. (1940) ch. 1, notes to §§ 1-18.

¹⁴¹ See WALDO E. WALTZ, *The Nationality of Married Women* (1937) 21 notes 15 and 16.

An analogous charge of trespass upon foreign sovereignty has been made by several authors with respect to legislations attaching a certain foreign nationality to corporations. See TRAVERS, 33 *Recueil* 1930 III 25; CAVAGLIERI, *Il diritto commerciale internazionale* 203; 2 ARMINJON (ed. 2) 460, no. 179. To the same effect 1 PONTES DE MIRANDA 460 objects to the Polish Law of 1926 on private international law, art. 1 par. 3, and P.G.R. of Liechtenstein, art. 235, on the ground that these provisions choose the business center of a corporation, even if in foreign territory, as the contact for determining the personal law of the corporation, although contrary to the local law of the place, and that the Liechtenstein provision seems in this way to determine the nationality of the corporation. This attack is unjustified at least inasmuch as merely the determination of private law rules is meant and *renvoi* is applied.

¹⁴² COLMET-DAAGE, 1 *Revue de droit français et étranger* (1844) 401.

The principle that acquisition and loss of nationality depend exclusively upon the law of the country concerned, is universally recognized not only in public but also in private international law; it is expressly stated in recent codifications.¹⁴³ Occasionally, however, there have been refusals to recognize certain foreign nationality regulations deemed to be contrary to public policy. French courts, for instance, have declined to recognize a Brazilian law of December 14, 1889, which bestowed Brazilian nationality upon all foreigners who resided in Brazil on November 15, 1889, and who did not expressly object to such en bloc naturalization.¹⁴⁴

This rule of international law is applicable without doubt to the determination of status under the nationality principle. In two cases, moreover, the conflicts law itself is affected:

Suppose a divorced French woman goes through a second marriage ceremony in France with a Catholic Spaniard. To ascertain whether the woman by this marriage acquires Spanish nationality, Spanish law exclusively is consulted by all courts. Accordingly, as (i) Spanish matrimonial law prohibits the marriage of a Catholic with a divorced person, and (ii) under Spanish conflicts law this nullifying prohibition is extended to foreign marriages of Spanish nationals, consequently (iii) by Spanish nationality law the wife does not acquire the nationality of Spain. Thus, a French court, in determining the question, would not apply its own conflicts rule designating the law applicable to the validity or invalidity of the marriage. This is a remarkable case; the preliminary question relating

¹⁴³ Liechtenstein: P.G.R. art. 29.

Código Bustamante: arts. 12, 14, 15.

Greece: C.C. (1940) art. 29.

Convention of the Hague on Conflict of Nationality Laws of 1930: art. 2.

¹⁴⁴ Trib. civ. Seine (July 13, 1915) *Revue* 1916, 67; cf. WEISS, 1 *Traité* 768; the Brazilian law has been recognized, however, by Ct. Sup. Lisbon (May 15, 1934) *Nouv. Revue* 1935, 424. In another case the same tribunal refused to recognize the acquisition of nationality by birth under a foreign country's *jus soli*: Trib. civ. Seine (Feb. 1, 1916) *Revue* 1916, 217. *Contra*: JORDAN, 4 *Répert.* 675 no. 144.

to the marriage apparently is answered in accordance with the law applied in deciding the main question. On the other hand, for some other purpose the same court may declare the marriage valid under French law. The distinction between these two solutions has baffled some writers unduly.

When according to this rule that nationality depends on the municipal law applied by the country involved,¹⁴⁵ the nationality of an individual has been ascertained (or found unascertainable), the ordinary conflicts rules of the forum determine his status. In a second group of problems, however, the French courts, considering that French nationality is at stake, have gravely altered their conflicts rules.

The decision of the French Supreme Court in the *Mareschal* case illustrates the practice.¹⁴⁶ An illegitimate child was acknowledged in Switzerland by his Swiss mother's declaration on the birth register. Under Swiss law, an illegitimate relationship was created between the child and the mother, and the child acquired Swiss nationality.¹⁴⁷ French conflicts law would have recognized this state of affairs, had not the father who was of French nationality ultimately also acknowledged the child in a document sufficient under French law. Because this entailed a question of French nationality, the court examined the entire situation from the viewpoint of French municipal law, under which the mother's recognition was found insufficient. Accordingly, the father's was the first and decisive acknowledgment, and the child was deemed a French national. This doctrine subjects the determination of private law questions relating to acknowledgment, to considerations derived from a nationality law instead of the law of conflicts.¹⁴⁸

¹⁴⁵ See, as to German law LEWALD 8 no. 10; MELCHIOR 253 § 169.

¹⁴⁶ Cass. (civ.) (Feb. 25, 1930) D.1930.I.113, S.1930.I.321. See *infra* p. 169, n. 40.

¹⁴⁷ Swiss C.C. art. 324; cf. BG. (June 29, 1928) 54 BGE.I 230, 232.

¹⁴⁸ COLIN, Note D.1921.I.1 and in his report to the Court of Cassation, Clunet 1923, 89, 93; LEREBOURS-PIGEONNIÈRE no. 349 A.

That this is not a foregone conclusion is demonstrated by the German law respecting legitimation, which, only if valid under the German laws,¹⁴⁹ including German conflicts rules,¹⁵⁰ is a ground for acquiring German nationality, and not inversely. The conflicts rules operate independently and determine whether there is German citizenship.

2. Determination of Domicil

Variety of domicil concepts. In much of the literature, the diversity of domicil concepts is emphasized.¹⁵¹ It is opportune to note just what the differences are. Primarily, the British doctrine of domicil is to be distinguished from that of all other systems; it is more or less unique, first, because of the abnormal place occupied by the domicil of origin, second, because of the prevalence of tendentious casuistry. The English writers, recognizing that the decisions of the House of Lords have done much to alienate the legal concept of domicil from its natural lines,¹⁵² are frankly unhappy with the artificial character of their doctrine and its arbitrary results. On the other hand, in some countries, such as Denmark,¹⁵³ the notion of domicil is undeveloped.

Apart from these anomalies, however, it should not be supposed that in the doctrines of the great majority of coun-

¹⁴⁹ German Nationality Law of July 22, 1913, § 17 (5).

¹⁵⁰ RAAPE 562.

¹⁵¹ See the surveys given by BARBOSA DE MAGALHAES in 23 *Recueil* 1928 III 121; LEVASSEUR, *Le domicile et sa détermination en droit international privé* (1931); WERNER VON STEIGER, *Der Wohnsitz als Anknüpfungsbegriff im internationalen Privatrecht* (Bern, 1934) 119; VITTORIO TEDESCHI, *Il domicilio nel diritto internazionale privato* (1933) and the same author's review of STEIGER's book, 10 *Zausl.PR.* (1936) 1067, see also NEUNER, 8 *Zausl.PR.* (1934) 89-92. On the differences of municipal conceptions of domicil see the comparative study by VITTORIO TEDESCHI, *Del domicilio* (1936).

¹⁵² KEITH, "Some Problems in the Conflict of Laws," 16 *Bell Yard* (Nov. 1935) 4, 5. In the *Winans* case, [1904] A.C. 287, KEITH recalls, the *propositus* had not found a domicil in England during 37 years; Ramsay, in *Ramsay v. Liverpool* [1930] A.C. 588, lived from 1891 or 1892 to 1927 in Liverpool and ordered himself buried there, but the Lords unanimously declared him domiciled in Scotland and seemed astonished that another view should be taken.

¹⁵³ HOECK, *Personalstatut* 6.

tries there exists no common simple idea of domicil, at least at bottom. It would be unfortunate to press to such conclusion the multitude of learned definitions of domicil.¹⁵⁴ All countries deriving their laws from Roman conceptions agree in requiring both physical presence or actual abode (residence) and intention to maintain this residence for an indefinite time on the part of the person concerned. The American law shares this view, although terminology and definitions sometimes vary. Despite the frequent use of the term "residence" in American statutes involving questions of status,¹⁵⁵ it is the general opinion that an appropriate intention is also required; in the Restatement, it is made plain that the proper term is "domicil."¹⁵⁶

The apparent divergence of cases concerning the domicil of choice is due not so much to national diversities as to the broad latitude of discretion which the courts all over the world seem to reserve to themselves in determining where a person is or was domiciled. In part, this is attributable to the desire of the courts to decide individual cases in accordance with what they regard as fair justice; the individualized exercise of such discretion has often given the appearance of an arbitrary or inconsistent handling of the problem.¹⁵⁷ But in part the courts also seem to react against the exaggerated generalization by

¹⁵⁴ MAHAIM, reporter to the Institute of International Law, 1931, has collected fifty different definitions of domicil given in the world literature. See *Annuaire* 1931 II 180. He thinks this shows, against the current belief, that the concept of domicil is far from being similar in all countries. On the contrary, it shows that the literature has spoiled a fairly uniform subject by scholastic definitions.

¹⁵⁵ 1 BEALE 110 § 10.3; 4 Proceedings American Law Institute (1926) 348.

¹⁵⁶ Cf. Restatement § 9 e and the use of the term "domicil" as indicated by the Index sub "domicil."

¹⁵⁷ For instance, Englishmen and Americans are declared to be domiciled in France (see NIBOYER 610) or in Switzerland (as in the decision of the Trib. Zürich, Oct. 25, 1935, 32 SJZ. 202 no. 41 and others of the same tribunal) in order to assume jurisdiction for divorce. The same occurs daily in this country. Thus, for example in the famous case of *Gould v. Gould* (1923) 235 N.Y. 14, 138 N.E. 490 the matrimonial domicil for obvious reasons was declared to be in New York, although the divorce decree of Paris was recognized (*infra* p. 470, n. 40).

which one basic notion of domicile apparently has been adopted for such different fields as jurisdiction and venue, taxation, poor relief, exercise of civil rights, voting, and conflicts law.¹⁵⁸

Where an individual is not free to establish his domicile but is subject to the interference of legal rules, differences are more deeply rooted. Thus, the domicile of dependent persons, particularly of married women, gives rise to problems.¹⁵⁹ Again, the former singular provision of the French Civil Code (art. 13) that a foreigner had to obtain authorization by the French government to have a domicile in France, greatly disturbed the international order. A British subject who was permanently located in Paris but had not obtained such authorization, for the purposes of the French courts, was not there domiciled, although so regarded under German, Italian, and even English standards. Thus, the English courts declared that Mrs. Annesley acquired a domicile of choice in France, although she never had applied for governmental permission.¹⁶⁰ By law of 1927, this peculiar doctrine was repealed, and the French courts proceeded in accordance with the ordinary concept of domicile. Recently (1938), however, a French decree has required an alien to possess a police identification card allowing him to stay in France for more than one year, in order to acquire, exercise, or enjoy statutory rights presupposing French domicile or residence.¹⁶¹ In France, adoption of children depends on this condition (C.C. art. 360), and the cele-

¹⁵⁸ This is well known; cf. 3 Proceedings American Law Institute (1925) 224, esp. W. W. COOK, *ibid.* 226; COUDERT, "Some Considerations in the Law of Domicil," 36 Yale L. J. (1927) 949; Restatement, New York Annotations 6. Cf. Mr. Justice Frankfurter's dissenting opinion in *Texas v. Florida* (1939) 306 U.S. 428.

¹⁵⁹ For illustration take the case of German RG. (Jan. 12, 1939) HRR. 1939, no. 376 (the legal domicile of a child whose legitimacy is attacked, but is not yet avoided, is determined according to the conflict law of legal paternity (EG. BGB. art. 19), whereas the court of appeal had applied the *lex fori*). See in respect of the wife, below, p. 310, of the child, below, p. 605.

¹⁶⁰ *In re Annesley*, Davidson v. Annesley [1926] Ch. 692. See also the discussion in *Harral v. Harral* (1884) 39 N.J.Eq. 279.

¹⁶¹ Decret-loi (Nov. 12, 1938) J. Off. 12-13 Nov. 1938, art. 1; SIREY 1939.4.1080, D.1939.4.162-163, Clunet 1939, 315.

bration of marriage is expressly subjected to it.¹⁶² But the prohibition does not invalidate an act in violation thereof.¹⁶³

Finally, the dogmas that every person must have a domicile, and that no person can have more than one domicile at a time¹⁶⁴—in force in British countries, the United States, France, Switzerland, Argentina, etc.—have been discarded in the German Code as contrary to the realities of life.¹⁶⁵

Despite these embarrassing variances, it should not be impossible to arrive at a reasonable unification of the conditions under which domicile may be acquired. This is demonstrated by those bilateral international treaties that incorporate a definition of domicile in their text, as well as by the determinations of domicile by international courts for the specific purpose of treaties lacking such definition.¹⁶⁶ A far-reaching unification has been achieved in this country, as a result of the insertion of the topic in the law of conflicts instead of regarding it as a matter of domestic law. The rules provided in sections 11 to 41 of the Restatement are uniform rules of private law, transferred into conflict of laws. The British common law countries and the countries unified by the Treaties of Montevideo have attained an analogous result.

Which law decides? As the answer to the question of domicile thus may vary, the question arises under what law a court should define the elements constituting domicile.¹⁶⁷ This problem is of evident interest in the countries where domicile is the general test of status rights, but it is also of importance else-

¹⁶² Art. 7 of the decree. Cf. TAGER, "Statut des étrangers," *Clunet* 1939, 278, 288, critical of the marriage prohibition and the immature character of the decree.

¹⁶³ This seems to be the meaning of Circ. Letter, Dec. 13, 1938, J. Off. 6 Jan. 1939, A. 1939. Lois annotées 1346, Circ. 3, par. 2.

¹⁶⁴ NEUNER regards this dogma as the chief reason for the confusion complained about by the lawyers of the common law countries, see NEUNER, "Policy Considerations in the Conflict of Laws," 20 *Can. Bar Rev.* (1942) 479 at 494.

¹⁶⁵ BGB. § 7.

¹⁶⁶ Permanent Court of International Justice, Judgment of May 25, 1926, *Série A* no. 7, 79; Arbitral Decision (July 10, 1924) of President Kaackenbeeck, 33 *Z.int.R.* (1924-1925) 321; cf. TEDESCHI, *Domicilio* 105-112.

¹⁶⁷ See literature, *supra* n. 151.

where; for instance, in France and other countries succession to movables upon death depends on the law of the last domicile of the deceased. That this problem usually is identified by writers and courts with the question under which law domicile (or residence) required for judicial jurisdiction must be determined, is unfortunate. In consequence, the application of the *lex fori*, natural where jurisdiction is concerned, has been advocated as if it were equally natural in matters of choice of law.

Lex fori. Thus, the English courts, after some vacillations, now take it for granted that they have to apply the English concept whenever they determine an individual's domicile.¹⁶⁸ The same approach seems to prevail in the United States,¹⁶⁹ where it has been adopted in the Restatement.¹⁷⁰ The courts of the Netherlands likewise determine domicile in accordance with the concept of the forum and refuse to apply the national law of the person, because they believe that the definition of domicile does not pertain to the functions of the personal law.¹⁷¹

In a broad way, the same result has been reached through the theory that the determination of a person's domicile is a problem of "characterization" and therefore must be answered in accordance with the *lex fori*.¹⁷² This means that the conflicts

¹⁶⁸ *In re Martin*, Loustalan v. Loustalan [1900] P. 211, 227; *In re Annesley*, Davidson v. Annesley [1926] Ch. 692; *Fleming v. Horniman* (1928) 44 T.L.R. 315; CHESHIRE 168.

¹⁶⁹ *Harral v. Wallis* (1883) 37 N.J.Eq. 458; *Harral v. Harral* (1884) 39 N.J.Eq. 279. Cf. 1 BEALE § 10.1.

¹⁷⁰ Restatement § 10.

¹⁷¹ H.R. (Jan. 5, 1917) W.10073. It must be noted, however, that the case dealt with jurisdiction, in a suit against a ward of German nationality; for this purpose the minor was considered domiciled with his Dutch guardian, according to BW. art. 78, irrespective of German law; recently Rb. Amsterdam (Apr. 9, 1926) Clunet 1928, 1296; Rb. Amsterdam (Nov. 26, 1926) Clunet 1928, 1293; Rb. Dordrecht (Dec. 9, 1936) W. 1937, no. 921 (domicil by operation of law for a minor foreigner in the Netherlands with his guardian, BW. art. 78); see also Rb. Almelo (May 13, 1936) W. 1937, no. 258 (German illegitimate child, but domicil for the purpose of the child's bastardy proceedings).

¹⁷² See MELCHIOR 177 n. 7; DE NOVA, 30 Rivista (1938) 388, at 399. LEWALD, Règles Générales des conflits de lois 91 n. 23 (with other citations).

rule of the forum referring to the law of the domicil necessarily refers to the law of the place considered to be the domicil under the private law of the forum. If, for instance, an American citizen resides in Paris, a French court would determine at what place he is domiciled solely in accordance with the French concept of domicil, as indicated by examination of the French law.

Yet, in the common opinion,¹⁷³ it is not inconsistent with this theory that, to use the same example, the American and not the French definition of domicil should be decisive for the problem of renvoi. Where an American citizen lives in France at the time of his death, a French (or German) court in determining succession to his movables, will consult first his national law, i.e., the American, which is deemed to refer to the inheritance law of the last "domicil." To comply with this reference, the court must ascertain whether the last residence constitutes a domicil in the meaning of the American rule, because this is the rule (of back reference, *loi renvoyante*) to be applied.¹⁷⁴ This construction of domicil is not considered an exception to the supposed principle of characterization according to the *lex fori*, for in this case it is the American conflicts rule, not that of the forum, that applies and with it the American concept of domicil.

¹⁷³ See particularly KAHN, 1 Abhandl. 66; also in 30 Jherings Jahrb. (1891) 76; NIBOYET 686 no. 565; LEREBOURS-PIGEONNIÈRE 378 no. 323, 2 ARMINJON (ed. 2) 58ff. no. 14 *sub.* (3) (with restrictions, n. 15); and among the French decisions Cass. (req.) (Dec. 30, 1929) D. H. 1930.65; Trib. sup. Colmar (Nov. 30, 1921) Clunet 1922, 379; App. Colmar (Jan. 14, 1925) Clunet 1925, 1044; Trib. civ. Seine (Apr. 27, 1933) Clunet 1934, 901. Cf. BATIFFOL, Revue Crit. 1935, 625. RG. (June 2, 1932) 136 RGZ. 361, 363; RG. (Apr. 6, 1936) 151 RGZ. 103; OLG. Karlsruhe (Jan. 21, 1930) IPRspr. 1930, no. 89 (British subject died in Freiburg; his domicil has to be ascertained according to British rules relative to British subjects born in India).

¹⁷⁴ Great Britian: *In re Annesley*, Davidson v. Annesley [1926] Ch. 692, 707. France: *Affaire Forgo*, Cass. (req.) (Feb. 22, 1882) Clunet 1883, 64; Cour. Rennes (July 24, 1923) Clunet 1924, 410; Trib. Civ. Seine (Dec. 19, 1927) Revue 1928, 511. But there are controversies in literature and in the courts. See J. DONNEDIEU DE VABRES, Revue Dr. Int. (Bruxelles) (1939) 167 at 184. NIBOYET 610 thinks even that in most cases domicil of Englishmen was assumed in contrast to English conceptions.

Is it not strange, however, that, to determine the status of a person according to his domiciliary law, a court in State X, when in doubt whether such person is domiciled in Y or Z, should follow its own internal law in localizing the domicile?¹⁷⁵

Even in the French school of thought, in which the doctrine of characterization of legal concepts according to the law of the forum has gained its strongest foothold, other theories have been advanced in startling variety. Some of the older authors, emphasizing the nationality principle, have proposed that domicile be defined in accordance with the national law of the individual.¹⁷⁶ Recent discussions have put forward two further points of contact. One opinion is that the law of the place of actual residence should be consulted to determine whether such residence constitutes domicile; this law is sometimes called the territorial law¹⁷⁷ and is favored as such by neo-territorialists such as Niboyet.¹⁷⁸ Another opinion, or rather formulation of the same trend, postulates that the law of domicile which should govern under the choice of law rule of the forum should determine also where the domicile is.¹⁷⁹ In fact, the Swiss rule referring the status of a Swiss domiciled abroad to the legislation of the domicile is said to imply the notion of domicile in the foreign law.¹⁸⁰ A similar interpretation—on doubtful grounds—has been given to the Argentine domiciliary rule by the court of Paris; in the eyes of the

¹⁷⁵ In contrast to the domiciliary principle itself, see NIEMEYER, *Das IPR. des BGB.* 69; NEUNER, 8 *Zausl. PR.* (1934) 90.

¹⁷⁶ WEISS, 3 *Traité* 321; VALÉRY 113 no. 116; cf. LEVASSEUR, *op. cit. supra* n. 151. Some writers claim that the Hague Convention on Divorce of 1902, art. 5 no. 2 has adopted this view, and some decisions, including German RG. (Apr. 5, 1921) 102 *RGZ.* 82, 84, have followed these writers. See MELCHIOR 180 n. 3; 3 FRANKENSTEIN 520.

¹⁷⁷ 1 BROCHER 247ff. His theory was advocated also by 1 ZITELMANN 83, 178 and adopted by the Código Bustamante arts. 22 and 25 as well as (in respect of jurisdiction) by the Swedish Law of July 8, 1904 with amendments, c. 6 § 3.

¹⁷⁸ See *infra* n. 183.

¹⁷⁹ STEIGER, *op. cit. supra* n. 151, especially at 161; TEDESCHI recognizes this law as determining domicile for certain status questions as a broad exception to the *lex fori* doctrine.

¹⁸⁰ Swiss NAG. art. 28; HUBER-MUTZNER 403.

Argentine legislator, the domicil acquired by an Argentine national in Paris, if not authorized by the French authorities and therefore not recognized under the then French law, is insufficient to determine the law applicable to his inheritance.¹⁸¹ Actual residence in the foreign country is presupposed, however, in such cases. In these polemics, the main argument against the *lex fori* is that domicil, like nationality, establishing a social and political tie between an individual and a state, should be construed under the law of that state. Particularly, it has been considered strange to determine an individual's personal status on the ground of his domicil in a country which does not recognize him as one of its domiciliaries. This is the argument anticipated in Westlake's statement that "no one can acquire a personal law in the teeth of that law itself,"¹⁸² a consideration which has much impressed Niboyet, formerly the strongest advocate of the *lex fori* doctrine.¹⁸³

A draft treaty worked out by the League of Nations¹⁸⁴ attempted to eliminate the "conflict of the conflict of laws relating to domicil" by combining the theory of "territoriality" with the *lex fori* principle. A similar spirit is shown in the rules adopted in 1931 by the Institute of International Law,¹⁸⁵ according to which the courts in each country determine under its own domestic legislation whether an individual is or is not

¹⁸¹ Argentina: C. C. art. 3283 (new 3317); Cour Paris (May 10, 1929) Clunet 1930, 405, Revue 1930, 126, affirmed by Cass. (March 7, 1938) Revue Crit. 1938, 472, Nouv. Revue, 1938, 143; cf. J. DONNEDIEU DE VABRES, "Le renvoi et l'affaire de Marchi della Costa," Revue Dr. Int. (Bruxelles) (1939) 167.

¹⁸² WESTLAKE § 254.

¹⁸³ NIBOYET in S. 1929.2.162; S. 1930.2.129; Revue Crit. 1935, 762; and among others 1 Traité (1938) nos. 514-515, 552ff.

¹⁸⁴ See Publ., League of Nations C.343.M.101.1928.V: BARBOSA DE MAGALHAES, Memorandum, p. 14 and Draft Convention for the Settlement of Conflicts of Laws in the Matter of Domicil, p. 17 art. 2: Questions connected with change of domicil except such as concern a person's capacity at law or the existence of a domicil by operation of law shall be settled in conformity with the law of the court if the latter be that of one of the States concerned, otherwise, in accordance with the law of the place in which it is claimed that the last domicil was acquired. Cf. also Draft by BARBOSA DE MAGALHAES in 23 Recueil 1928 III 138.

¹⁸⁵ Annuaire 1931 II 239.

domiciled therein; the Institute also provides for the case where two or more foreign laws conflict in respect of domicile and declares that, between two or more voluntary domicils, the place of actual residence, if any, should be preferred. The Institute has shown a possible solution through this auxiliary conflicts rule. Further progress toward unification of "domicil", considered as a connecting factor, will perhaps be reached if future writers not only distinguish the concept as a category of status law from other meanings of domicile, but also differentiate rules dealing with capacity of contracting, succession upon death, recognition of foreign judgments, etc., in order to ascertain which kind of domicile is a desirable connecting factor for each of these separate matters.¹⁸⁶

V. CHANGE OF PERSONAL LAW

Under the system of personal law, a person's status is changed whenever he changes his nationality or, where the domicile principle prevails, when he changes his domicile.

I. Change of Nationality

In the countries that determine personal status in accordance with the law of the country of which the individual is a national, the problem arises how a change of nationality affects an individual's status as a person of full age. Under German law, infancy is terminated upon an individual's completing his twenty-first year of life.¹⁸⁷ In Illinois a woman is regarded as of age when she has completed her eighteenth year.¹⁸⁸ When a nineteen-year-old American girl from Illinois is naturalized in Germany, is she again reduced to the status of infancy?

¹⁸⁶ Cf. FRANCIS, "The Domicil of a Corporation," 38 Yale L. J. (1929) 335, 341 and TEDESCHI, *Domicilio* 8. GUTTERIDGE, "Conflicts of Jurisdiction in Matrimonial Suits," 19 Brit. Year Book Int. Law (1938) 19, 26ff. thinks a worldwide definition of domicile for the exclusive purpose of jurisdiction for divorce quite possible.

¹⁸⁷ German BGB. § 2.

¹⁸⁸ Probate Act, § 131. Laws, 1939, p. 4, at p. 37.

Article 7 paragraph 2 of the Introductory Law to the German Civil Code contains an express provision by which this result is prevented. Even though she is now subject to German law as her personal law, the girl continues to be treated as of age by the German courts. Can the same result be reached without such a provision of the new personal law, for instance under article 3 of the Japanese Law of 1898, which, although following literally the German article 7, has omitted the said paragraph 2? This question has been answered in the affirmative,¹⁸⁹ but it has been objected that full age does not constitute a vested right and would have to be reacquired under the new statute.¹⁹⁰

2. Change of Domicil

Since domicil can be changed more easily than nationality, the problem is even more acute in those countries where an individual's personal status is determined in accordance with the law of the country where he is domiciled. That a once acquired status as a person of age is preserved in spite of a change of domicil to a country where infancy is terminated at a later age, has been recognized in the conflict of laws of Denmark,¹⁹¹ and Norway,¹⁹² as well as in the Treaty of Montevideo.¹⁹³

¹⁸⁹ Austrian decisions, see WALKER 128 n. 42; 1 BAR § 144; NIEMEYER, *Das IPR. des BGB.* 126; ROLIN, 2 *Principes* 196 n. 655; POULLET 319 n. 2.

¹⁹⁰ WEISS, 3 *Traité* 344; 1 FRANKENSTEIN 426 n. 82; RAAPE 79; and French, Italian and other German writers quoted by these authors.

¹⁹¹ BORUM and MEYER in 6 *Répert.* 216 no. 22 (doubtful).

¹⁹² CHRISTIANSEN in 6 *Répert.* 573 no. 100 (generally recognized).

¹⁹³ Treaty on international civil law (1889) art. 2, provides that change of domicil does not affect capacity acquired by emancipation or coming of age. The new text of 1940 reads to the effect that change of domicil does not affect capacity.

Argentina: C. C. arts. 138 and 139. SCHLEGELBERGER interprets art. 138 as not applying to a change of domicil from one foreign country to another (4 *Zausl.PR.* (1930) 751). The opposite view is taken by VICO (vol. 1, nos. 493, 494) who refers for support to the ancient statist theories.

In the United States, however, capacity is generally independent of domicile; in the exceptional case where domicile is determinative, it seems that the actual domicile alone is taken into consideration.

VI. RATIONALE ¹⁹⁴

I. Tradition

Before modern states arose and developed the concept of allegiance, the only and obvious test of personal law was domicile, either of origin or of choice, special considerations applying to dependent persons.

This test is still important in those states where private law is divided into different systems. Domicile is still the natural criterion in the British Empire and in the United States, as it formerly was in France before the Revolution, in Italy before 1866, and in the old German Empire and in most parts of the second German Empire before the Civil Code took effect on January 1, 1900. It goes too far, however, to pretend that the principle of nationality is absolutely impracticable for a country that lacks uniformity of private law throughout its territory.¹⁹⁵ In such a country, domicile is the best element of contact in the relations between the several territories, but in the relations of the country as a whole to foreign countries either test may be used. As a matter of fact, in 1926, Poland chose the domicile test for interlocal relations among her several territories under Warsaw-Polish, Russian, German, Austrian, and Hungarian laws, but declared nationality to be decisive for problems of personal law in international relations. Thus,

¹⁹⁴ Mere reference is made to the selected bibliography and the treatment of old and recent so-called "theoretical arguments," by 2 ARMINJON (ed. 2) 28ff. no. 9.

¹⁹⁵ See 1 BAR § 91 at 267, 268 discussing WHARTON §§ 20 ff, whose arguments against nationality have been reassumed, however, by POLLOCK, Book Review, 31 Law Q. Rev. (1915) 106 and 3 BEALE 1934.

a foreigner domiciled in Poland stands under his national personal law, and a Polish citizen living abroad has to obey the laws which Poland applies to all her nationals as well as the law of that Polish territory where he had his last domicile, or in the absence of any former domicile, the laws of the state capital. Such a system would be theoretically conceivable for other composite countries. In the United States especially, despite the fact that states constitute the territories of private law, the constitutional circumstances are somewhat analogous, considering that state citizenship has become subordinate to federal nationality; the American system has been determined, however, by other elements.

2. Political Considerations

An important role has been played not only by tradition but also by political considerations which have influenced the law-making agencies of the various countries, consciously as well as unconsciously.

The unilateral rule of article 3, paragraph 3 of the French Code, although reflecting traditions of the old *coutumes*, represented the idea that a French citizen should enjoy the achievements of the great Revolution wherever he might happen to be and that he should be bound everywhere by its laws by virtue either of tacit agreement or simply by natural law. Mancini held the idea that, in contrast to the strict territoriality of public law and public policy, the needs of an individual were served best by rules of family, inheritance, and status law of universal application; since the laws dealing with these topics are the product of all those factors that determine a people's national character, the laws of a person's national community should be considered most suitable for him wherever he may live. These notions of the French revolutionists and of Mancini were widely discussed; they appealed to the

trend of nationalism of the nineteenth century; and they were widely adopted in the numerous national codifications of the period. When the German Civil Code was enacted in 1896, the test of nationality had won such a firm hold that the traditional system of domicil could be discarded almost without discussion. Whenever new waves of national feeling were stirred up in the twentieth century, they resulted almost invariably in the adoption of the principle of nationality as best fitted to protect the needs of the national community.¹⁹⁶

3. Economic Considerations; Migrations

While these ideological arguments have been working in favor of the principle of nationality, the domicil principle has found support in the desire of immigration countries to incorporate new immigrants into the legal life of their country as soon as possible, and thereby to avoid the difficulties that would arise if each new immigrant prior to naturalization were to be judged in accordance with the laws of his home country. These considerations have been of crucial influence in the United States,¹⁹⁷ as well as in Switzerland and Argentina.¹⁹⁸ They have been gaining ground in Brazil: ¹⁹⁹ the new Introductory Law of September 4, 1942, has radically substituted the principle of domicil for that of nationality, previously incorporated in the code.²⁰⁰ A few other South American coun-

¹⁹⁶ Cf. PILLAUT, *Revue* 1916, 14, 32, and see National-Socialist writers such as REU in 57 *RVerwBl.* (1936) 521 and HORST MÜLLER in *DJZ.* 1936, col. 1065. LORENZEN, in a Book Review, 33 *Am. J. Int. Law* (1939) 427 observes that RAAPE's recent manual on German international private law greatly extends the principle of nationality.

¹⁹⁷ See 3 BEALE 1935.

¹⁹⁸ Argentina, which had adopted the principle of nationality in 1857 and re-affirmed it in 1862, later went over to the domiciliary law in the C. C. of 1869.

¹⁹⁹ RODRIGO OCTAVIO, *O direito positivo e a sociedade internacional* (Rio de Janeiro, 1917) 113, quoted by 1 VICO 365 no. 424; Report of the Brazilian Delegate (ESPINOLA) to the Third Commission of the Sixth Panamerican Conference, see *Diario de la Sexta Conferencia Internacional Americana* (Habana, 1928) no. 30 p. 420; cf. BUSTAMANTE, *La nacionalidad y el domicilio* (1929).

²⁰⁰ *Lei de Introdução*, 1942 Decreto-Lei no. 4657, art. 7.

tries have changed in recent years from nationality to domicile, obviously yielding to the influence of immigration policy.²⁰¹

Especially in France, where considerable masses of foreigners had come to live before the outbreak of World War II, the advantages of the domiciliary system for an immigration country began to be appreciated. Characteristic of the change of mind is the attitude of the treatises edited by Niboyet. As late as 1928, he reprinted the opinion of Pillet²⁰² explaining the French doctrine as follows:

The French sovereignty has no interest in subjecting all individuals in France to the provisions of the Civil Code in matters of status and capacity. It has, on the other hand, a marked interest not to let its nationals evade the operations of its laws . . .

But at the same time he declared²⁰³ the problem to be more political than doctrinal and shortly thereafter became the leader of a movement aiming to control all inhabitants of France by French law. Extended discussions of the *Comité Français de Droit International Privé* were devoted to this endeavor, which almost all French experts seem to approve.²⁰⁴

²⁰¹ Guatemala had the nationality rule in its Law on Foreigners of 1894, art. 48, 2d sentence, and adopted the principle of domicile in the C. C. of 1926, libro I, art. 12, from which the provisions on conflicts law were transferred in 1933 to the Constitutive Law of Judicial Power, and more recently to the Law on Foreigners of 1936, arts. 17 and 18. See MATOS nos. 136, 172.

In Peru, the Civil Code of 1851 had no express rule but was often interpreted in the sense of nationality test. Despite Peru's participation in the Montevideo Treaties of 1889, the Commercial Code of 1902 seemed to confirm this theory, art. 15, following art. 15 of the Spanish Commercial Code and determining the capacity of foreigners according to their *lex patriae*. Draft and text of the Civil Code of 1936 have followed the domiciliary system; cf. *supra* p. 119.

²⁰² NIBOYET 699. See moreover PILLET, 2 Manuel (ed. 1) 515: how would we conceive that an individual minor in his country of origin could become capable or incapable according to the countries where he would be contracting?

²⁰³ NIBOYET 702 no. 587.

²⁰⁴ See Travaux du Comité français de droit int. privé, *Années* 1-4 (1934-1937) and in *Revue Crit.* 1939, 171, report on the meeting of May 23, 1938, concurring "le statut de l'étranger." These studies started significantly with an *Exposition* by M. Louis-Lucas on the territoriality of law and the new tendencies towards it. NIBOYET, *Traité* Vols. 1 and 2; LEREBOURS-PIGEONNIÈRE 266; BARBEY, *Le Conflit* 215, and respecting the question of capacity, see below.

Countries from which large portions of the population emigrate, are attracted, on the other hand, by a principle which tends to preserve the ties between the emigrant and his home country. Great Britain furnishes a striking illustration of this tendency, namely, the doctrine of domicile of origin, which has often been compared with the bonds effected by the principle of nationality, a doctrine maintained and developed to satisfy the natural desire of a home country from which innumerable colonizers have gone out into the world. Even in the United States where in theory only one kind of domicile is known, courts usually have been reluctant to recognize that an American citizen has transferred his domicile to a foreign country, especially when there are assets in this country to be distributed or taxes to be assessed.²⁰⁵ This, in practice, is a domicile of origin.

Similar considerations have contributed to the popularity of the nationality principle itself in Germany and Italy, from which millions emigrated to the New World in the latter part of the nineteenth century. However, this circumstance should not be overestimated. Until very recent times, neither Germany nor Italy pursued any consistent policy in preserving relations with their emigrants. Until 1913, a German citizen living abroad even lost his citizenship after ten years, unless he had himself expressed his desire to retain allegiance by formally registering with the German consulate.²⁰⁶

Wherever in those countries the principle of nationality did not satisfy nationalistic tendencies, there could scarcely have resulted a change from the principle of nationality to

²⁰⁵ COUDERT, "Some Considerations in the Law of Domicil," 36 Yale L. J. (1927) 949, 961; comments in 37 Yale L. J. (1928) 1127, 1129, and particularly the cases commented upon by COUDERT: *Matter of Spencer*, N. Y. L. J. June 2, 1908 (not reported); *United States Trust Co. of New York v. Hart* (1912) 150 App. Div. 413, 135 N. Y. Supp. 81, *aff'd* (1913) 208 N. Y. 617, 102 N. E. 1115.

²⁰⁶ German Law on Nationality of 1870 (*Staatsangehörigkeitsgesetz*), replaced by Law of July 22, 1913.

that of domicile but rather an extension of the application of the principle that "laws of public safety and police" apply to every person sojourning within the territory of the forum. By such an order of ideas, the principle of nationality is maintained for nationals abroad and narrowed with respect to foreigners living in one's own territory. This unhappy result has been achieved in the Latin American codifications indicated above.²⁰⁷

4. Practicability

Respecting the practicability of the alternative tests, it has often been alleged that citizenship is not changed so easily nor so often as domicile or residence, and in consequence that a law based on nationality could not be evaded so smoothly as a law based upon domicile. The former is therefore said to be better fitted to govern the conditions of such transactions as marriage, adoption, or testament, than a law which the *propositus* can voluntarily renounce. Moreover, nationality is credited with being a relatively clear and simple concept compared with the uncertainties and multiformity of domicile, especially in its British varieties. Recent critics in England have admitted that the English conception is "both artificial and complex."²⁰⁸ The force of this argument is somewhat questionable, in view of the complexity of modern citizenship laws and the circumstance that the British domicile of origin is not a domicile at all. On the other hand, it has been argued in favor of the principle of domicile that it is closer to facts and more consistent with the principle of territoriality.²⁰⁹ But neither are these considerations in themselves advantages. It is noteworthy, however, that, after the first World War, the practical difficulties caused by the consideration of strange or

²⁰⁷ See *supra* pp. 117-119.

²⁰⁸ FOSTER, "Some Defects in the English Rules of Conflict of Laws," 16 Brit. Year Book Int. Law (1935) 84 at 85.

²⁰⁹ NIBOYET, in 2 *Mélanges offerts à M. Mahaim* 679 ("chant de la terre") quoted by VAN HILLE, 65 *Revue Dr. Int. (Bruxelles)* (1938) 294, 296.

obscure foreign laws under the principle of nationality were acutely felt in Germany. For this reason, the same suggestions were made, as in France for reasons of immigration policy, that the local law should again govern the status of domiciled foreigners.²¹⁰

So far as outside parties are concerned, either system opens the door to prejudicial mistakes respecting the legal capacity of foreigners.

The perplexity of the situation is illustrated by the strange fact that while many Continental writers are quite set upon restoring the principle of domicile,²¹¹ it has been said in England that "the best course would seem to be to adopt the doctrine of nationality as applied on the Continent."²¹² All agree, however, that for the time being there is no hope of any such radical modifications. It may naturally be concluded that efforts should be directed to fundamental improvement of both criteria.

5. Efforts to Reach a *Modus Vivendi* Between the Two Principles

The contrast between the two systems of determining personal status is deeply rooted in traditions and policies, and the near future holds no prospect of its elimination. It appears therefore the more necessary to devise ways and means to achieve practicable decisions in individual cases in spite of the coexistence of the two different systems.

(a) The most effective means has proved to be the *renvoi*, of which, in fact, the chief field of application is status and capacity to engage in transactions.

²¹⁰ See 4 Z.ausl.PR. (1930) 390 on proceedings of the law commission of the Prussian Chamber of Representatives (particularly p. 396 on marriage requirements, see *infra* p. 291) and 5 Z.ausl.PR. (1931) 633 an opinion of Schilling recommending retention of the domicile principle for the Baltic States.

²¹¹ Also in the Netherlands, an address by Kollewijn in Batavia (1929) against the "degenerated" principle of nationality is regarded as a characteristic sign; cf. OFFERHAUS, in *Gedenkboek 1838-1938*, 705.

²¹² FOSTER, 16 *Brit. Year Book Int. Law* (1935) 84. Cf. *supra* p. 108, n. 23.

(b) The Hague Conferences simply adopted the principle of nationality; the Treaty of Montevideo adhered to the domicil principle. During the making of the *Código Bustamante*, serious but inadequate proposals were made to bridge the gulf: ²¹³

First, the principle of the Hague Convention on Marriage that the national law should govern except where it refers to another law (*renvoi*); second, an analogous idea, advocated by the Uruguayan delegate, Varela, that the law of domicil should govern, except where it refers to another law, particularly to that of nationality; and third, the notable suggestion of De Bustamante that every contracting state shall apply to a national of another state that law which is applied to him by the state to which he belongs. Cubans would thus be treated in all states according to the national principle, and Argentinians according to the law of domicil.²¹⁴ This would give nationality a certain preference in the outcome, quite as the *renvoi* theory does, and evidently produce an adequate solution.

More recently, however, at the Scandinavian Convention of February, 1931, establishing conflict of laws rules for matrimonial relations, adoption, and guardianship,²¹⁵ the problem was more successfully resolved. Sweden and Finland apply nationality as the test, while Denmark, Norway, and Iceland retain domicil as controlling. To regulate the relations between the five countries, the Convention admits the law of domicil in the first instance and secondarily the law of nationality. Article 1 provides, for instance, that where a national of one of the participant states is domiciled in one of the other states for at least two years, his marriage is governed by the law

²¹³ BUSTAMANTE, *Tres Conferencias sobre derecho internacional privado* (1929) 46ff.

²¹⁴ BUSTAMANTE, *La Nacionalidad y el domicilio* (1927) 61. In twenty different situations ten times nationality, and ten times domicil would result as test (pp. 64, 67).

²¹⁵ Cf. BLOCH, 8 *Z.ausl.PR.* (1934) 627.

of the state of domicile; otherwise, the law of the state to which he belongs controls.

At its meetings in Cambridge, 1931, and Oslo, 1932, the Institute of International Law, formerly a strong supporter of the principle of nationality, attempted a compromise with a marked tendency toward the Anglo-American doctrine; but the issue did not appear hopeful.²¹⁶

(c) The following case illustrates a recurrent problem, which particularly needs efficient relief:

A marriage between German parties was dissolved by a divorce decree of an American court. Subsequently, the husband became an American citizen and married another wife in this country. The judgment not being recognized in Germany because of alleged lack of reciprocity of recognition, it seemed certain that, in Germany, the second marriage would be held invalid, the issue thereof illegitimate, and as such not entitled to share in the husband's estate. However, the court of appeals in Berlin upheld the validity of the second marriage for several reasons, of which the most effective seems to have been the court's desire not to upset a factual situation that had been established in the United States.²¹⁷ Judgments of this kind, if more frequent, would hollow out the extraterritorial effect of the personal law. But the problem is comprehensive. States with nationality as the test extend their regulations beyond their frontiers to their citizens abroad, more often than not colliding with the states of immigration imposing different rules upon the same persons.²¹⁸ Even if this extension of au-

²¹⁶ See BRIERLY, observations on the Draft mentioned above, n. 184, *Publ. of League of Nations C.343.M.101. 1928. V p. 19.* From the British angle, GUTTERIDGE, 65 *Revue Dr. Int. (Bruxelles)* (1938) 15; cf. TEDESCHI, *Domicilio* 17.

²¹⁷ KG. (Jan. 13, 1925) JW. 1925, 2146; cf. MELCHIOR, 3 *Z.ausl.PR.* (1929) 745, also MELCHIOR, *Grundlagen* 414 § 279. See, moreover, LG. Berlin (Aug. 6, 1934) 7 *Giur. Comp. DIP.* no. 28 (a German national was divorced and remarried in Czechoslovakia; the court recognized the divorce only because of the following remarriage); *contra*: MASSFELLER, *StAZ.* 1936, 335; ECKSTEIN, 7 *Giur. Comp. DIP.* 33.

²¹⁸ This is seen by FEDOZZI 230, arguing with CAVAGLIERI 145.

thority, so much resented in Latin America, were justified in itself, it should certainly not be allowed to produce effects beyond the time of acquisition of a new nationality by a former citizen of the forum. But even without a change of nationality, it is shocking that the national law should lay hold of a man who abandoned his country many years ago, and of his children and grandchildren, who live in different surroundings and never think of themselves as subject to any law other than that of their new country. If the principle of nationality is to survive, its claim should cease at least when the *propositus* has established himself in a new country and has founded new family relations, or simply when considerable time has elapsed. The Harvard Research in International Law in its Draft Convention on Nationality has proposed to restrict the acquisition of nationality by birth (*jure sanguinis*) to the second generation of an emigrant.²¹⁹ This solution would be of some help, but the pretensions of the old personal law should be limited even more strictly.

6. Conclusion

We may well conclude that both systems of testing the personal law are seriously defective. The principle of nationality, however, suffers not merely from its complicated nature. We shall see that its unpopularity, so conspicuous in the French literature, has reached critical proportions in court decisions and legislation, in particular with respect to divorce.

There is one more circumstance apt to destroy what usefulness nationality may still have as a criterion for status. Many millions of people have emigrated in the course of the war, in the estimate of some experts as many as thirty millions in Europe alone, and others will do so; millions have also lost their former citizenship or will not be able to prove to which state they belong. In European countries where the nationality

²¹⁹ 23 Am. J. Int. Law Spec. Supp. (Harvard Law School) (1929) 13, art. 4.

principle had its origin, a formidable intermixture of populations is about to render it obsolete. Moreover, should federations be created, the relation of individuals to the federal governments will be so important as to offset the ties of nationality.

Thus, domicile, the dominant concept of the English-speaking part of the world and the emergency concept considered above in connection with the cases of *apatrides*, holders of several nationalities, citizens of composite empires, etc., in Europe, might resume its old importance, if only it were not of such uncertain nature.

Can the domiciliary test be improved? It should be possible to obviate at least the clandestine establishment of a domicile of choice, which renders doubtful the determination of so many cases. In Europe, it would seem quite feasible to require that any voluntary change of domicile be reported to a public authority empowered to investigate. In European countries, residence and domicile of individuals are constantly being controlled by official agencies for the purposes of defense, police, and taxation. Little innovation is necessary to establish the personal law by a formal record. In this country, such intrusive bureaucratism is probably out of the question. But the divorce statutes present an alternative method of assuring that one party is actually domiciled at the forum; they usually require, not a public record of the establishment of domicile, but the lapse of a certain period, ordinarily a year, during which domicile must have existed.²²⁰ Very remarkably, the Polish Interlocal Law of 1926 has generally provided that a person changing his domicile from one part of Poland to another, only after the lapse of one year, becomes subject to the law of his new domicile with respect to his capacity, his family relations and his inheritance.²²¹ An analogous idea ap-

²²⁰ See 2 VERNIER § 82; *infra* pp. 408-410, 460.

²²¹ Law on interlocal private law of Aug. 2, 1926, art. 2.

pears in the above-mentioned French decree of 1938 requiring that in order to avail themselves of their French domicil or residence, foreigners should possess police permits to sojourn in the country for more than a year.²²² However questionable this novelty, a product of prewar apprehensions, may appear, it is true that the existence of a voluntary domicil can be better ascertained, if a period of factual residence is added to the ordinary requisites, as in the American divorce law, or if the individual has secured official authority to reside more than a year in the country, as prescribed in the French emergency decree.

²²² See *supra* p. 141.

CHAPTER 5

Specific Applications of the Personal Law

I. PERSONAL CHARACTERISTICS

IN the conflict of laws, especially in civil law countries, the sphere of application of the personal law is extensive. The branches in which the personal law is of the greatest importance are the law of family relations and that part of the law of contracts and other transactions which regards capacity. The application of the personal law to these branches of the law is to be discussed separately. The present chapter is concerned only with its application to the remaining personal relations.

1. General Capacity to Have Rights and Duties

While in the days of slavery personality was not enjoyed by all human beings,¹ it is now taken for granted that every human being is a person and as such capable of having rights and duties. However, some exceptions still persist. Under the canon law of the Roman Catholic Church, an individual is deemed to lose his personality upon joining certain monastic orders. In a few countries, this rule of the canon law is still recognized as exerting an analogous effect in the temporal order of affairs.² The German Reichsgericht once decided, applying the rules of the then prevailing principle of domicile, that the personality of a woman who had become a nun in a

¹ Restatement § 120 comment d.

² For instance: in Ecuador C. C. arts. 92-94. In the Chilean C. C., arts. 95-97 have been canceled by Law no. 7, 612 of Oct. 11, 1943, art. 2.

In Argentina the canon law rule is expressly denied recognition C. C. art. 103.

In Austria a monk was held incapable of acquiring any new rights; the assets owned by him at the time of his entry into the order were placed under curatorship, 1 EHRENZWEIG-KRAINZ (1925) 161 § 70.

Russian convent was extinguished to exactly the same extent that it was under her personal law, i.e., the law of the place of the convent.³

A few countries and states, among them several of the United States, have retained the old punishment of civil death. The meaning of this term is quite doubtful under the modern statutes. Constituting a penal measure, such a diminution of a person's legal status is generally disregarded by other states or countries.⁴

Capacity of having rights and duties includes capacity to sue and be sued in the sense of what the Continental doctrine terms capacity of being a party⁵ or of "standing in court."⁶ As individuals generally have full personality, they enjoy such capacity, while it may be wanting in the case of unincorporated associations. It seems that procedural rules everywhere acknowledge that capacity to sue and to be sued in this sense is determined by the personal law, in this country the law of domicil.⁷ The question is entirely distinguishable from that of the procedural capacity of a person, i.e., to effectuate procedural acts on his own behalf or on behalf of another person, a capacity that is affected by incompetence.⁸

For a long time, Continental authors have discussed so-called "special capacities."⁹ This term covers a variety of different problems which preferably should be discussed individually.

³ RG. (July 13, 1893) 32 RGZ. 173, 175 (capacity of a Russian Catholic nun to be a party to a German lawsuit, decided according to the law of the place of her nunnery).

⁴ For details see Note, 6 U. of Chi. L. Rev. (1939) 288.

⁵ See, for instance, German Code of Civil Procedure, § 50: Capable of being a party to a lawsuit is he who is capable of having rights.

⁶ "*Stare in iudicio*" (Roman law), "*ester en justice*" (French law), "capacity to stand in judgment" (Louisiana lawyers).

⁷ Federal Rules of Civil Procedure, rule 17 (b).

⁸ Cf. German Code of Civil Procedure, § 52 and *infra* p. 181.

⁹ Cf. SAVIGNY § 364; for French theories of BOULLENOIS and FROLAND see 2 LAINÉ 207, 211; for a theory of BROCHER cf. GEBHARDSCHE MATERIALIEN 70.

The term "special capacity" has been used, first, to indicate those characteristics which an individual must possess in order to qualify, for instance, for the office of guardian or administrator or for membership in a cooperative association or for eligibility as a member of a board of a corporation. Such requirements, not affecting the individual's general personal standard, are regulated by that law which determines the other incidents of the legal relation in question.¹⁰ Hence, a person's capacity to serve as administrator of a decedent's estate is determined by the law of the state in whose court the estate is being administered, and a person's capacity to be a member of a corporation is determined by the law of the state of incorporation.

The term "special capacities" is used, secondly, as referring to the numerous rights and privileges enjoyed by a country's citizens as opposed to resident or sojourning aliens. As said before, this vast topic, traditionally covered in the French books on private international law, exceeds the boundaries of the law of conflicts and pertains to internal administrative law.

The term "special capacities" is employed, finally, to designate requirements for certain transactions, such as that of a certain age for marrying or that the parties be not married to each other as a condition for the validity of a gift. Where such requisites are not regarded as mere applications of the personal law, they must be considered separately.

2. Beginning and End of Personality

The determination of the exact moment at which an individual's personality begins¹¹ is generally referred to the

¹⁰ German courts, see LEWALD 39, no. 43, NEUMEYER, IPR. (ed. 1) §20; GUTZWILLER 1626.

¹¹ The various municipal laws are not all alike in this respect. § 1 of the German Civil Code provides, for instance, that an individual's personality (*Rechtsfähigkeit*) begins with the completion of his birth. According to the Civil Code of Spain (C. C. art. 30), however, an individual is not recognized as a person until he has lived at least twenty-four hours.

personal law, which also determines the legal status of a child *en ventre sa mère*.¹²

Difficult problems of conflict of laws are caused by the differences of municipal laws with respect to absentees. The two world wars have given this subject ominous importance. Most laws follow one or another of three different systems:

First: the rebuttable presumption of the common law, according to which an individual is presumed to be dead when he has been absent without being heard of for a stated number of years, for instance, seven years;

Second: the French system, according to which a person's unexplained absence for a stated period of time is judicially investigated and established and certain effects similar to those of death are incurred;¹³

Third: the German system, of much influence upon recent legislations, according to which the legal effects of death take place when and only when a judicial decree has been issued providing that the absentee shall be regarded as dead (declaration of death) and as having died at a certain moment.¹⁴

¹² Art. 28 of the Código Bustamante reads:

"Personal law shall be applied for the purpose of deciding whether birth determines personality and whether the unborn child shall be deemed as born for all purposes favorable to him, as well as for the purpose of viability and the effects of priority of birth in the case of double or multiple childbirth." (Translation in 22 Am. J. Int. Law Supp. (1928) 276). See also HUBER-MUTZNER 410.

On the other hand, art. 53 P.G.R. of Liechtenstein applies the law of that principality to persons born within its territory, in matters governed by Liechtenstein law. Application of the territorial law is also advocated by GEMMA, *Revue* 1930, 48, and by FEDOZZI 370.

¹³ This system prevails in most countries whose private laws follow the general pattern of the French Code, including Italy. For Switzerland, where it has been modified in several respects, see below n. 16.

¹⁴ German BGB. §§ 13-19. War emergency laws of 1916, 1917 and 1925. Although French writers had disapproved of this institution, it was imitated in the first World War for persons missing in war; see RHEINSTEIN, 13 *Rheinische Z.f. Zivil- und Prozessrecht* (1924) 50. Shortly before World War II in 1939, Germany and Italy modified their laws on absentees according to the model of the rules concerning persons missing in war; see R. SCHMIDT, "Das neue, italienische Verschollenheitsrecht," 13 *Zausl.PR.* (1940) 103. While Italy, however, retained the declaration of absenteeism, Spain, by Law of Sept. 8, 1939, adopted the German system, see 42 *Bull. Inst. Int.* (1940) 120.

A workable solution of some of the most important problems of conflict of laws respecting absentees has been provided by article 9 of the Introductory Law to the German Civil Code, as modified by the Law of July 4, 1939, § 12, which may be summarized as follows:

(1) An absentee is declared dead by a German court in accordance with German law, if he was a German citizen at the time of his disappearance (§ 12 par. 1); a foreign declaration of death will not be recognized in such case by a German court.

(2) Upon the application of his wife, a male absentee of foreign nationality is declared dead by a German court in accordance with German law, if the wife is domiciled in Germany and is a German national or was a German national before her marriage (§ 12 par. 3); this provision is designed to enable the wife to remarry.

(3) Irrespective of whether or not he has been a resident of Germany, a foreign absentee is declared dead pursuant to German law with respect to such of his assets as are situated in Germany and to legal relations governed by German law (§ 12 par. 2).

These rules have been used as a model in several countries, either for statutory enactments¹⁵ or in judicial practice.¹⁶ Austria, which is among these countries, considers a foreign

¹⁵ Poland: Law of 1926, art. 4.

China: Law of 1918, art. 8.

Japan: Law of 1898, art. 6.

Liechtenstein: P.G.R. art. 57 par. 2.

¹⁶ Belgium: Trib. Antwerp (July 13, 1939) cited by VAN HILLE, 66 Rev. Dr. Int. (Bruxelles) (1939) 758, 760.

Switzerland: particularly, the third rule stated above is followed, see App. Basel-Stadt (Feb. 19, 1932) 30 SJZ. (1933-1934) 269 no. 53 (a man born in Basel, naturalized a citizen of Minnesota, not heard of since 1906; assets inherited by him in 1910 were taken in public deposit; in absence of a written rule, the judge decides as in the case of a Swiss citizen); cf. Just. Dep. I, BBL. 1933, II 75 no. 9, 30 SJZ. 120 no. 94; FRITZSCHE and PESTALOZZI, 9 Z.ausl.PR. (1935) 702; SCHNITZER 139. On other controversial points see BECK, NAG. 424.

absentee's last domicil in the country as a ground for jurisdiction.¹⁷

The principles that problems of the law of absentees should be determined in accordance with the personal law of the absentee, and that jurisdiction for judicial action belongs primarily to the state of which he is a national or domiciliary, as the case may be, have been recognized in France¹⁸ and Italy¹⁹ and in many other countries.²⁰ Hence, for instance, the Austrian law was applied in both Germany and Switzerland to determine whether the former Austrian Archduke Johann, who had become a ship's captain, had assumed the name of Johann Orth and had disappeared without being heard of, was to be regarded dead.²¹ Local rules are in force, however, practically everywhere, providing for temporary care and custody of the property of a foreign absentee.²²

Under the principle of personal law, a court recognizing a declaration of death pronounced by the competent national

¹⁷ Austrian Law of February 16, 1883, § 1, amended by Law of March 31, 1918. With respect to an absentee whose last domicil was in Austria, the courts of the country of which he was a national have been declared to lack jurisdiction by the Austrian Supreme Court (Nov. 3, 1909) 12 GIU. NF. no. 4776; *contra*: WALKER 221. On Czechoslovakia see HOCHBERGER, 4 Z.osteurop.R. (1938) 623.

For Switzerland, see Civil Code arts. 35-38; Just. Dep., BBl. 1916, II 522; HUBER-MUTZNER 411. The question whether Swiss courts may pronounce a foreigner absent was declared unsettled by the Swiss Department of Justice on July 12, 1933, 30 SJZ. (1933-1934) 120 no. 94.

¹⁸ Trib. civ. Seine (April 24, 1931) Clunet 1932, 83, Revue 1931, 504. Swiss law was applied not only with respect to the family relations of a Swiss absentee but also with respect to his property. The decision has been criticized by J. DONNEDIEU DE VABRES 436, 437.

¹⁹ See FEDOZZI 271; no decisions seem to have been published, however.

²⁰ The Belgian Trib. Antwerp (July 13, 1939) 9 Rechtsk. Wkbl. 1939, 44 no. 8 excepts the first period of absence from being exclusively governed by the Polish law, but *contra* the opinion of the State Attorney Van Hille and the note, *ibid.*

²¹ German RG. (June 28, 1893) 4 Z.int.R. (1894) 72; Swiss BG. (Jan. 22, 1897) 23 BGE. I 166, 171. The remarriage of the wife of a missing Russian husband was held invalid by a German court because the Russian absentee was not declared dead and was deemed to be living under Russian law, OLG. Kiel (Nov. 30, 1926) Schlesw.-Holst. Anz. 1927, 145. See also LEWALD 41 no. 47 and NUSSEBAUM, D. IPR. 117.

²² See 1 VICO 433 no. 499 with respect to the countries of Latin America.

court, will also recognize restrictions imposed upon the effects of such a declaration. Thus, the wife of a Czechoslovakian national declared dead in Czechoslovakia was not permitted to remarry in Germany, since an additional decree was necessary to dissolve the marriage under Czechoslovakian, though not under German, law.²³

The approach which regards a man as either alive or dead for all purposes is more satisfactory than to regard the same person as alive for some purposes and as dead for others. For instance, whether a missing heir or legatee is to be regarded as dead can more consistently be answered in accordance with his personal law than in accordance with the laws governing the descent or the distribution or the administration of assets, possibly lying in different jurisdictions.²⁴

There also are different rules in the case where two or more persons perish in a common disaster: some laws presume that the deaths have taken place in a certain order, others reverse that order, and in a third group no presumption exists. Is this problem a question of the personal law? Writers are in disagreement.²⁵ The Brazilian Law suggests application of the national law; the *Código Bustamante* also applies the

²³ Czechoslovakian Law of June 30, 1921, art. V; KG. (Sept. 25, 1931) IPRspr. 1932, no. 12; cf. WENGLER, 8 Z.ausl.PR. (1934) 238 n. 1.

²⁴ The law governing the distribution of the estate has been applied in the following cases: German RG. (Jan. 7, 1890) 25 RGZ. 142, Clunet 1892, 1191; KG. (May 31, 1897) 9 Z.int.R. (1899) 468, Clunet 1900, 163; OLG. Hamburg (Nov. 27, 1896) Hans.GZ.Beibl. 1897, 243; OLG. Colmar (June 12, 1912) Els. Lothr. J. Z. 1913, 38. The personal law of the absentee has been applied by Ob. Trib. Stuttgart (July 8-10, 1862) 15 Seuff. Arch. 321; Bay. ObLG. (May 17, 1890) 13 Bay. ObLGZ. 50 no. 17 (a man who had emigrated to the United States in 1869 and was declared dead in 1886, was considered to have inherited a share in the meantime, as he was presumed living at the time of the succession under the law of his last German domicile). A third solution was adopted by OLG. Dresden (Dec. 20, 1909) 66 Seuff. Arch. 68, 70. The application of the *lex successionis* has been approved by LEWALD 41 no. 46, and M. WOLFF, IPR. 59, and disapproved by NUSSBAUM, D. IPR. 117.

²⁵ Cf. WEISS, 4 Traité 572 and DESPAGNET 1046 no. 365 (advocating personal law); 2 BAR § 365, p. 311, tr. by GILLESPIE 805 (law of succession on death); VALÉRY 1194 no. 842 and NUSSBAUM D. IPR. 117, n. 2 (*lex fori*).

national law, but only to the field of distribution of estates, a limitation of the principle which has been criticised.²⁶

3. Name

(a) *Individual name.* Beale has stated that the determination of an individual's personal name is not regarded in common law countries as a problem of status, since a person is traditionally free to assume a name and to change it at his discretion.²⁷ However, today most American states allow special court proceedings to aid and confirm a change of name, and a name thus acquired cannot again be changed without the intervention of the court.²⁸ Moreover, the right to use a name is governed by important legal rules.²⁹ In civil countries it is well recognized that a person's name is determined by law and that, therefore, problems of conflict of laws can arise with respect to the determination of an individual's name and to the manner and extent of his protection against abuse of his name. Traditionally, these questions are decided in accordance with the individual's personal law,³⁰ except such as are controlled by imperative local regulations.³¹

²⁶ Código Bustamante art. 29; cf. the criticism by PONTES DE MIRANDA, 39 Recueil 1932 I 555, 622, 671.

²⁷ Linton v. First National Bank (1882) 10 Fed. 894; Application of Lipschutz (1941) 32 N. Y. S. (2d) 264. Cf. 2 BEALE § 120.3.

²⁸ COHEN, "The Law Concerning Change of Personal Names," 2 Conn. B. J. (1928) 110, 115 n. 14; Note, 16 Chi. Kent Rev. (1937) 65, 66 n. 15.

²⁹ See 45 C. J., Names 382 § 18.

³⁰ Germany: RG. (April 11, 1892) 29 RGZ. 123, 127; RG. (Dec. 12, 1918) 95 RGZ. 268, 272. KG. (April 22, 1927) IPRspr. 1927, no. 19. KG. (April 15, 1932) JW. 1932, 2818, IPRspr. 1932, no. 11.

Switzerland: NAG. art. 28; BG. (Oct. 24, 1907) 33 BGE. I 770, 776; BG. (July 14, 1910) 36 BGE. I 391, 395; BG. (Nov. 22, 1934) 60 BGE. II 387, 388. GIESKER-ZELLER, Der Name in Internationalen Privatrecht (in Festschrift für Georg Cohn (Zürich, 1915) 167ff); HUBER-MUTZNER 419.

France: Trib. civ. Seine (Feb. 28, 1935) D.H. 1935. 276; aff'd by Cour Paris (Dec. 15, 1936) D. H. 1937-72, Revue Crit. 1937, 690 (Prince Colloredo-Mansfeld, right of divorced wife to carry the name of her former husband).

Italy: FEDOZZI 362, quoting a decision of Cass. pen. Feb. 17, 1928.

³¹ The reported judgment of the court of Paris (n. 30) supposes French laws respecting names possibly to have public interest but discounts expressly any influence of French public policy.

Thus, it has been held by German courts that an individual's right to use a title of nobility is to be determined by his national law.³² Such titles having been entirely abolished in Czechoslovakia, a citizen of that country is denied the right to call himself a count in Germany. On the other hand, the Reichsgericht has held a Swiss citizen entitled in accordance with Swiss custom to append to his own name the titled name ("von B") of his wife.³³ Whether a foreigner's change of name is recognized depends on the recognition or non-recognition of such change of name by the country of which he is a national.³⁴

In suits for damages for abuse of a person's name, or in suits for an injunction against such abuse, a tendency exists, however, to resort to the local law, or to the law applicable to delictual actions, even where the personal law provides actions on other theories. In Germany it has been held, for reasons of public policy, that the measure of damages in a foreigner's action for wrongful appropriation of his name, is not higher than in an analogous action by a German national.³⁵ It has also been suggested that it should never be lower.³⁶

Within the realm of application of the personal law, doubts have arisen with respect to families whose members are not all of the same nationality. Where, for instance, a wife's nationality is different from that of her husband, the Swiss Federal Tribunal has held her name to be determined by her own

³² KG. (Sept. 19, 1904) 15 Z.int.R. (1905) 329; KG. (Dec. 19, 1907) 19 Z.int.R. (1909) 244; KG. (April 15, 1932) JW. 1932, 2818, IPRspr. 1932, no. 11.

³³ RG. (Dec. 12, 1918) 95 RGZ. 268, 272.

³⁴ Switzerland: The Justice Department refuses, in the case of a child of Swiss nationality (BBl. 1907, I 539), and recognizes in the case of a German child (BBl. 1921, III 836), the name given to the child by a German step-father according to a German institution unknown to Swiss law (viz., the cantonal law in 1907 or federal law in 1921).

Dutch decisions; see VAN HASSELT § 1.

³⁵ KG. (April 29, 1920) JW. 1921, 39; KG. (April 8, 1914) Leipz. Z. 1915, 1327; RG. (Nov. 29, 1920) 100 RGZ. 182, 185 (both referring to the "Gervais" case). Cf. EG. art. 12 restricting tort actions against German nationals to what may be claimed under German law.

³⁶ RAAPE, 2 D. IPR. 380; see also J. DONNEDIEU DE VABRES 437.

national law,³⁷ while in Germany the general rule governing marital status presumably applies, and the wife's name is determined in accordance with the national law of the husband.³⁸

(b) *Commercial name (firm)*. In Germany³⁹ and Switzerland,⁴⁰ it is held that the firm or official name of a commercial enterprise is determined by the law of the principal establishment. On the other hand, in Belgium national and foreign firms are equally protected under the local law.⁴¹ In France, a foreigner is held not to be entitled to any protection of his commercial name, unless such protection is provided by treaty or reciprocity is otherwise assured.⁴² The most important treaty, to which France, together with the majority of the commercial countries of the world, is a party, is that of the Paris Union for the Protection of Industrial Property.⁴³ Under article 8 of this convention, the commercial name of a citizen or corporation of any signatory country is protected in every other signatory country without any preliminary registration, deposit, or other formality being required.

4. Status as Merchant

In most of the countries of the European Continent and of Latin America, merchants are subject to duties which are

³⁷ BG. (July 14, 1910) 36 BGE. I 391, 395; see STAUFFER, NAG. art. 8 no.

15.

³⁸ GEBHARDSCHÉ MATERIALIEN 183; RAAPE 290; NUSSBAUM, D. IPR. 125. The Reichsgericht (Nov. 23, 1927) 119 RGZ. 44 has applied in an analogous way to the name of an illegitimate child the law governing illegitimate relationship rather than the child's personal law. An obscure rule is in force in Liechtenstein, P.G.R. art. 45.

³⁹ RG. (Oct. 2, 1886) 18 RGZ. 28; RG. (Nov. 13, 1897) 40 RGZ. 61, 64; RG. (May 31, 1900) 46 RGZ. 125, 132.

⁴⁰ 2 MEILI 262 § 167; tr. by KUHN 450.

⁴¹ Cass. belge (Dec. 26, 1876) Pasicrisie 1877.1.54; POULLET 155 no. 150.

⁴² Decisions in Clunet 1902, 304; Trib. Bordeaux (Aug. 4, 1902) Clunet 1903, 866. In the Netherlands, however, protection to a foreign commercial name depends on a Dutch Law of July 5, 1921 (S.842) cf. the liberal decision of H. R. (May 31, 1927) W. 11675, VAN HASSELT 653; to the contrary effect Kg. Amsterdam (Sept. 30, 1924) NJ. 1925, 142.

⁴³ English text in U. S. Treaty Series, No. 834.

not incumbent upon other individuals and, correspondingly, entitled to special privileges not enjoyed by non-merchants. Special rules also apply to numerous types of contracts where the parties, or in certain cases one of the parties, belong to the class of merchants. Wherever such special rules are in force, the determination of a person's status as merchant or non-merchant is generally regarded as a problem of personal law. However, in consonance with the traditions of the law merchant, in the determination of the personal law nationality is disregarded in favor of the law of the "commercial domicile," i.e., of the place where the business is established.⁴⁴ The French Committee for Private International Law, after full discussion, recently voted a legislative motion to amend the French law accordingly.⁴⁵

Distinguishable from the quality of being a merchant is the capacity of carrying on a business as a prerequisite to becoming a merchant; this question is commonly regarded as governed by the law determining the legal acts of minors, married women, insane persons, etc.⁴⁶

⁴⁴ Germany and Italy: dominant opinion *cf.* FICKER in 4 *Rechtsvergl. Handwörterb.* 462.

Poland: Law of 1926, art. 2.

Switzerland: *cf.* HUBER-MUTZNER 420.

Argentina: *cf.* 3 VICO, nos. 221, 243, etc.

Treaty of Montevideo on international commercial law of 1889, art. 2; Treaty of Montevideo on international terrestrial commercial law, text of 1940, art. 2. More detailed provisions in Código Bustamante arts. 232ff.

Other opinions: 2 BAR § 290 (2) at 130 and in 1 Ehrenberg's *Handbuch des gesamten Handelsrechts* (1913) 330; MELCHIOR 151 § 105; NUSSBAUM, D. IPR. 211; SCHNITZER 134, 151.

⁴⁵ *Travaux du Comité français de droit international privé*, Seconde année (1935) 132, on the capacity to be a merchant in international relations (text of proposition at 169). See also the resolution of the Institute of International Law in Cambridge (1931), 36 *Annuaire II* 1931, 181, on NIBOYET's proposal. Against the unfortunate application of the *lex fori* in the Hague Draft of 1925 on Bankruptcy, see NIBOYET 519, no. 426.

⁴⁶ BAR, 1 Ehrenberg's *Handbuch* 343; 3 VICO, nos. 234, 237.

Insofar as the character of a transaction as commercial or non-commercial ("civil") is determined by elements other than the status of the parties, the law that governs the contract in general is held to be decisive.⁴⁷

5. Infancy

Another situation regarded by civil law lawyers as pertaining to status is that of infancy. An infant's capacity to engage in transactions is limited; he is subject to parental power or guardianship; his domicile is fixed by operation of law; his position as a party to a lawsuit is peculiar; and a variety of other special rules apply to him. Hence, the personal law determines the age at which infancy generally terminates, as well as the events which may affect the individual's position during infancy.

A basically similar view obtains in England and has sometimes guided American courts, for instance, in affirming the power and duty of the domiciliary state to decree custodianship⁴⁸ or to terminate guardianship⁴⁹ over infants. It has occasionally been recognized that attainment of majority at the domicile is sufficient to terminate ancillary administration of a minor's property in another jurisdiction.⁵⁰ Story, however, speaking of the disabilities of minors as well as of other incapacities, associated himself with those among the statistists who, in this then much debated question,⁵¹ instead of conceiving infancy or majority as aspects of personal status, regarded incapacity to take part in legal transactions as incidental to specific contracts or other acts.⁵² As indicated below, this has become the general doctrine of this country. (See Chapter 6.)

⁴⁷ DIENA, 1 *Dir. Commer. Int.* 62.

⁴⁸ *Griffin v. Griffin* (1920) 95 Ore. 78, 187 Pac. 598, 604.

⁴⁹ *In re Honeyman* (1922) 117 N. Y. Misc. 653, 192 N. Y. S. 910.

⁵⁰ For cases see 2 BEALE 663 n. 2.

⁵¹ See STORY, throughout c. IV; 1 FOELIX (ed. 3) c. II 181.

⁵² STORY § 103.

In the Continental discussion, the two following points have attracted interest:

(1) In certain jurisdictions, marriage ends the period of infancy, whether of females or of both males and females, either unconditionally or with certain provisos. This is illustrated by the statutes of twelve American jurisdictions⁵³ as well as by a number of European laws.⁵⁴ Under the European conflicts rule, such attainment of majority by marriage depends upon the personal law of the infant. Since, for instance, under Hungarian law women reach majority by marriage, a nineteen-year-old Hungarian girl who marries an American and, by this fact, neither acquires American citizenship nor loses Hungarian citizenship, will be regarded as being of full age by every court applying the nationality test.⁵⁵ On the other hand, a young Englishman marrying in Italy is not emancipated, as the Italian rule on emancipation does not apply to his status.⁵⁶ The case of a bride who acquires her husband's nationality on marriage under the nationality law of the husband's country is more doubtful. If a Swiss girl of seventeen marries a German and thereby changes her nationality, is the Swiss rule, "Marriage imports majority," able to terminate her infancy, although she abandons her Swiss personal law at the very moment of her marriage? Affirmation of this question is favored in recent German literature.⁵⁷

(2) Under the German and related systems the status of a person of full age may be granted to an infant by decree of a court or an administrative agency—"declaration of major-

⁵³ 5 VERNIER § 271.

⁵⁴ The Netherlands: BW. art. 385.

Hungary: ALMÁSI, 1 Ungarisches Privatrecht (Berlin, 1922) 54.

Switzerland: C. C. art. 14 par. 2.

Turkey: C. C. art. 11 par. 2.

⁵⁵ RAAPE 69.

⁵⁶ DIENA, 2 Princ. 115.

⁵⁷ WALKER 128 n. 39, 788; WAHLE, 2 Zausl.PR. (1928) 142, mentioning Austrian decisions to this effect; RAAPE 77; M. WOLFF, IPR. 61. *Contra*: 1

ity”⁵⁸—whereas in France, Italy, Spain, etc., less effective forms of “emancipation” are provided.⁵⁹ Similarly, at common law and under certain American statutes, a judicial decree may eliminate a part of a minor’s disabilities.⁶⁰ At civil law, jurisdiction to render such a determination is generally held to rest with the country which furnishes the personal law of the infant.⁶¹ This law also determines whether emancipation is possible at all, for what causes it may be conferred, and what effect it produces; it decides in particular whether the minor thus emancipated enjoys unlimited legal capacity or whether he needs special authorization or consent in particular situations.⁶² As will be discussed in detail below, the general rule of capacity in this country forms part of the law of the contract, while in the Continental system it refers to the personal law.

II. PUBLIC POLICY

Foreign law in the field of “status” is more often denied application on account of local policy considerations than in

FRANKENSTEIN 423, 3 FRANKENSTEIN 235 n. 31; LEWALD 57; BECK, NAG. 175 no. 72.

As to the effect of a newly acquired nationality of the bride, see RG. (Jan. 10, 1918) 91 RGZ. 403, 407 dealing with the question of whether guardianship over a German girl ended by her marrying a Russian in Czarist times. It seems that the court classified the question as one of the effects of marriage; this is why it quoted EG. arts. 14 and 15 and the Hague Convention of July 17, 1905 on Marriage Effects, arts. 1 and 2.

⁵⁸ Germany: BGB. §§ 3-5.

Austria: Allg. BGB. §§ 174, 252.

The Netherlands: BW. arts. 473 ff.

Brazil: C. C. art. 9; cf. PONTES DE MIRANDA, 39 Recueil 1932 I 622.

⁵⁹ France: C. C. art. 477.

Italy: C. C. (1865) art. 311; C. C. (1942) arts. 390ff.

Spain: C. C. art. 322.

⁶⁰ 5 VERNIER § 282.

⁶¹ On general principles, it would not appear unthinkable for a decree of emancipation to be rendered by a court of a country not that of the nationality, in accordance with the substantive law of the infant’s national law. On this question 1 FRANKENSTEIN 427; STAUFFER, NAG. art. 7 no. 7; RAAPE 91 (who thinks that it could be done where the procedure required by the personal law limits the cooperation of an authority to mere recordation (*blosse Beurkundung*)).

⁶² DIENA, 2 Princ. 114; O. VON GIERKE, 1 Deutsches Privatrecht (Leipzig, 1895) 221 ff.; WEISS, 3 Traité 342, and following these writers Swiss BG. (May

any other field of law. Regrettable as the disharmony caused thereby may be, it is a common trait of existing laws, a trait nowhere more distinct than in France where, to quote Julliot de la Morandière, each day the application of the personal law is progressively restricted in favor of French law.⁶³

However, a peculiar doctrine has been expressed by Dicey and repeated in America by Beale and the Restatement (§ 120), that a foreign status of a kind unknown at the forum (English or American law respectively) will not be recognized.⁶⁴ No other authority exists for this proposition than a few English cases which have been critically destroyed by Cheshire.⁶⁵

Thus, prodigality is "not a status at common law."⁶⁶ If a Frenchman domiciled in France is judicially declared a spendthrift by a French court, American courts will certainly recognize those effects of the decree which relate to transactions carried on in France.⁶⁷ But the question is whether an American court will ascribe effects to the French decree with respect to American transactions. In France, for instance, the spendthrift can bring a lawsuit only through a committee (family council). Can he sue without any guardian in the United States or in England? No doubt, appointment of a conservator in one American jurisdiction under a local statute, has been said to be inoperative on transactions in another jurisdiction, a statute being bare of extraterritorial meaning under an ancient statist doctrine.⁶⁸ Whatever the actual merits of this antique rule, a French interdiction of a prodigal does in-

23, 1912) 38 BGE. II 1, 3 (the declaration of majority is governed by the national law).

⁶³ Colombia, Comisión de Reforma del Código Civil (1939-1940) 218.

⁶⁴ DICEY 531 Rule 136 (I); 2 BEALE § 120.1.

⁶⁵ CHESHIRE 144. He thinks that *In re Selot's Trust* [1902] 1 Ch. 488, is to be explained upon other grounds and that *Worms v. De Valdor* (1880) 49 L.J. N.S. (Ch.) 261, has been decided wrongly.

⁶⁶ 2 BEALE § 120.8.

⁶⁷ Restatement § 120 comment c; 2 BEALE § 120.1: "The existence of the foreign status is a fact and should be recognized as a fact by a court in any state."

⁶⁸ *Gates v. Bingham* (1881) 49 Conn. 275.

tend to restrict the capacity of the individual everywhere. Dicey and Beale derive their thesis that such decree can not be recognized in a common law jurisdiction from an English decision, *Worms v. De Valdor*,⁶⁹ in which Frey, J., erroneously reasoned that the French adjudication of prodigality did not change the status of the person, although he asserted in addition "that if a change of status were effected by an order of a French court, this (English) court would not take notice of a personal disqualification caused by such change of status." No such problem is known in civil law. A French decree declaring an individual of French nationality and domicil a spendthrift is recognized in any other country, including Guatemala⁷⁰ and Chile,⁷¹ as affecting the individual's personal status. The principle has been well formulated by the Swiss Department of Justice with respect to foreign declarations of death, which are unknown to Swiss law; if not contrary to public policy, the foreign decree must be granted the same effect as conferred upon it by the foreign law.⁷²

With respect to legitimation and adoption, the implications of the Dicey-Beale theory are even more serious. Is such an act, performed abroad, not to be recognized by a court whose domestic law has not yet introduced the institution of legitimation or adoption? If such institutions are known to the forum, but the particular variety adopted by the foreign law is not, should the effect of the foreign act be limited to that given locally to the most nearly related type, rather than simply recognized to the same extent as in the foreign jurisdiction? ⁷³ American cases show a strong tendency to limit recognition of the foreign institution. An analogous opinion is widely held

⁶⁹ (1880) 49 L.J. N.S. (Ch.) 261; followed in *In re Selot's Trust* [1902] 1 Ch. 488.

⁷⁰ See MATOS nos. 218, 219.

⁷¹ Chile: App. Santiago (Nov. 7, 1934) 34 Revista Der. J. y Cien. Soc. (1937) II sec. 2, 14 (interdiction by judgment of the Italian Court of Genoa; exequatur granted by the Supreme Court).

⁷² BBL. 1916, II 522 no. 5.

⁷³ See GOODRICH § 142; STUMBERG 309; see also LORENZEN, 6 Répert. 349 no. 340. But see FALCONBRIDGE, Case Note, 19 Can. Bar Rev. (1941) 37, 39.

in the case of a foreign business organization whose exact type is not included in the domestic commercial order.⁷⁴ Or, in accordance with a recent suggestion, should the "status" created in a foreign country be recognized but its specific "effects" or "incidents" be reserved for close inspection under the light of the internal law of the forum?⁷⁵ This line of thought seems to result directly or indirectly in an extensive application of public policy, much as French courts and writers invest the provisions of the *Code Napoléon* with the dignity of international public order.⁷⁶ A foreign adoption of an infant was not recognized in France before such act was permitted in France in 1923 by an internal law.⁷⁷ The *Código Bustamante* declares that none of its provisions relating to adoption will apply to states whose legislations do not provide for adoptions.⁷⁸ All such rules are indefensible, inasmuch as they deny effect to foreign institutions without an urgent national interest in the particular case, a point clear to most French writers but often ignored by courts. Why should a country's own civil code rule the world?

On the other hand, English courts, before the Legitimacy Act of 1926, did not hesitate to recognize legitimation by subsequent marriage executed under foreign domiciliary law,⁷⁹ and at present they recognize California legitimations by recognition, though unknown to English statutes.⁸⁰ Argentine courts seem to treat foreign adoptions in the same way, their internal law notwithstanding.⁸¹ The Portuguese Supreme Court, recognizing a Brazilian adoption under analogous circumstances, held it a constant international rule that the non-existence of an institution in the *lex fori* does not prevent the

⁷⁴ This will be discussed in the second volume.

⁷⁵ This theory has been proposed by TAINTOR, "Legitimation, Legitimacy and Recognition in the Conflict of Laws," 18 Can. Bar Rev. (1940) 691 at 708.

⁷⁶ Cf. NIBOYET nos. 382, 660 and note in Nouv. Revue 1935, 425.

⁷⁷ See App. Paris (Jan. 2, 1936) Gaz. Pal. 1936.1.551.

⁷⁸ Código Bustamante art. 77.

⁷⁹ *In re Wright's Trusts* (1856) 25 L. J. (Ch.) 621, 2 K. & J. 595.

⁸⁰ *In re Luck* [1940] A. C. Ch. 864.

⁸¹ 2 VICO no. 172; ROGER, 6 Répert. 683 no. 44.

rights flowing from it from being given effect.⁸² The legal situation of a French illegitimate child recognized by a parent is enforced in Germany where this type of status is unknown.⁸³ The prevailing opinion certainly favors simple recognition of foreign legal situations without provincial restraint.

A third problem is illustrated in the Restatement by an English case, *Atkinson v. Anderson*:⁸⁴

"By the law of state X, the inheritance tax imposed upon 'strangers in blood' who inherit is at a higher rate than that imposed upon inheriting relatives and the term 'strangers in blood' is construed as including natural illegitimate children. The status of 'recognized natural child' exists in state Y but not in X. A dies domiciled in Y, bequeathing chattels in state X to C, who, according to the law of Y, is A's recognized natural child. C, on taking the chattels in state X, pays a succession tax as a stranger in blood."⁸⁵

However, this is an interpretation of a tax law and not a problem of international private law. It may well appear that an inheritance tax statute is intended to apply a higher tax rate to all illegitimate children. In such case, it would make no difference whether such children are or are not "recognized." Hence, the English decision in the case of *Atkinson v. Anderson* may be an entirely correct interpretation of the English tax statute, but it is not at all necessary to resort for its justification to a general theory of non-recognition of a foreign status unknown to the *lex fori*. For example, the Argentine tax on gratuitous transfer of property has been held applicable to a foreign adopted person "by simple interpretation of the tax statute" without regard to a conflicts rule.⁸⁶

⁸² Sup. Trib. Lisbon (May 15, 1934) *Nouv. Revue* 1935, 424, 427.

⁸³ Prussian Minist. Ord. of Aug. 29, 1924 (*StAZ.* 1924, 198): cf. RAAPE 522.

⁸⁴ Restatement § 120 comment b; 2 BEALE § 120.1 relies on *Atkinson v. Anderson* (1882) 21 Ch. D. 100.

⁸⁵ (1882) 21 Ch. D. 100.

⁸⁶ App. Buenos Aires (Dec. 10, 1926) 23 J. A. 856.

CHAPTER 6

Capacity

I. OBJECT OF THE DISCUSSION

THE laws of the various countries differ widely with respect both to the grounds on which certain individuals are denied normal competence and to the scope of the disabilities imposed. Also, the term, "capacity," is not used with quite the same meaning everywhere. For the purpose of the conflict of laws, distinction should be made between a general rule of capacity and numerous exceptions thereto defined by special rules.

The purpose of the general rule is to determine the law that is to govern a person's ability to bind himself by contract with other parties or by unilateral acts. In most countries, the general rule applies also to dispositions of property, though in some the law governing title to property, especially tangible assets, movable and immovable, extends to capacity.¹ The most important qualifications of the general rule are as follows:

- (a) The personal characteristics necessary to hold a person liable in tort are generally subject to the law governing tort.²
- (b) The effects upon property interests of such events as

¹ For the United States see 2 BEALE 1180 § 333.3; GOODRICH § 145. Also art. 10 of the Argentine C. C. seems to have been drafted in accordance with STORY §§ 102 and 424, and, following this model, to determine capacity with respect to immovables by the law of the situs; this has been demonstrated by CHÁVARRI 76 nos. 67ff., contrary to various opinions hitherto held. For Hungary, VON SZLADITS in 23 Grotius Soc. 1937, 28 explains that every woman, whether of Hungarian or foreign nationality or domicile, has free disposition of immovables on Hungarian soil. This subject is very difficult and cannot be treated here.

² To be treated in succeeding volume.

marriage, bankruptcy, or appointment of a committee are the object of special conflict of laws rules.³

(c) Questions pertaining to the borderline zone between the law of capacity as a general topic and the law of distribution of estates, must be discussed in connection with the latter subject. But it may be noted that the provisions in the French law designed to protect minor heirs in the distribution of a decedent's estate have been declared to be a part of the personal law of the heirs and therefore to be inapplicable to foreign heirs.⁴ In the United States, provisions that protect infants against the effects of statutes of non-claim apparently are considered part of the procedural law of the state where the assets are administered;⁵ the parallel with the French law is, of course, not perfect.

(d) Capacity to marry and to engage in other transactions of family law constitutes a particular topic to be discussed below.

In numerous countries, married women are still subject to restrictions of various kinds upon the legal effectiveness of their promises. The Restatement classifies the problem to what extent a married woman is subject to such restrictions as a problem of the law of contracts, which, both in accord with the general approach of the Restatement and in agreement with the majority of decisions, is declared to be determined by the law of the place of contracting.⁶ There is respectable authority, however, for the view that the state where a married woman is domiciled is justified in holding her incapable of

³ Restatement §§ 237, 238, 289, 290; Germany: M. WOLFF, IPR. 61, II.

⁴ Cass. (civ.) (April 13, 1932) S.1932.1.361 and Note by AUDINET; D.1932.1.89 with Note by BASDEVANT; Revue 1932, 549. Cf. J. DONNEDIEU DE VABRES 507. The estate of the late Robert of Bourbon, Duke of Parma, was distributed in accordance with the family statute of the house of Hapsburg-Lorraine, which was recognized as his personal law by Austria, the country of which he was a national. Hence, the French Supreme Court held that his family statute determined what protection was to be extended to minor heirs.

⁵ Cf. Restatement § 498.

⁶ Restatement § 333 comment.

contracting under its own rules, even where the contract was made in another state under whose law such contract would be binding upon her.⁷

Recognizing that limitations on the contractual capacity of married women are closely connected with the structure of the family and are motivated to a large extent by a desire either to protect families against financial ruin or to safeguard the dominating position of the husband as family head, the European laws tend toward classifying the problem of contractual capacity of married women as a problem of the law of family relations. Consequently, the law by which these problems are determined is that applying generally to the personal relations between husband and wife. This law need not necessarily be the personal law of the wife.⁸

(e) The legal consequences of insanity are determined by the personal law. Under the system of domicile, however, the voluntary acquisition of domicile by an insane non-resident presents difficulties,⁹ and the claim of the law of the domicile to govern transactions in such situations has been doubted.¹⁰

(f) The capacity of an individual to determine the conduct of a lawsuit to which he is a party, as distinguished from capacity to be a party, which has been treated above,¹¹ seems to be considered in this country as a matter of procedural law and governed, in consequence, by the internal law of the forum.¹² In the eyes of a Continental lawyer, this is a question of capacity to exercise rights, and therefore the answer depends on the personal law. Thus, it has been decided in the Netherlands that Swiss law governs the question whether a

⁷ *Union Trust Co. v. Grosman* (1918) 245 U. S. 412, per Holmes, J.; BATIFFOL, *Revue Crit.* 1936, 597, 619-621.

⁸ See *infra* p. 302.

⁹ CHESHIRE 403.

¹⁰ CHESHIRE 406 proposes the law with which the transaction of an insane person is most closely connected.

¹¹ See *supra* p. 162.

¹² See Restatement § 588 and *cf.* Federal Rules of Civil Procedure, rule 17 (b) and (c).

Swiss married woman can bring a lawsuit in a Dutch court without the consent of her husband.¹³ In an analogous way, the Swiss Federal Tribunal has declared that the power to do so affects capacity and therefore in the case of Swiss nationals is to be governed by the Swiss federal statutes rather than by the cantonal laws of procedure.¹⁴ However, as an exception to this rule the German Code of Civil Procedure declares that a foreigner lacking procedural capacity under his national law is deemed to have it when he would possess it under the law of the court.¹⁵

II. THE LAW GOVERNING CAPACITY

1. Capacity Governed by the Law of the Place of Contracting

The notion that the permanent characteristics of an individual are all to be regarded as incidents of his "status" and, therefore, all governed by the individual's personal law, is not current in the United States.

In this country, excepting Louisiana, the almost universal rule, clearly supported by commercial expediency, is, as stated by Goodrich, that the capacity of married women—which is typically involved in capacity cases—is governed by the *lex loci contractus*.¹⁶ "Some authorities seem to hold that capacity is to be determined by the 'law of the contract,' " ¹⁷ which may be different from the law of the place of contracting; but "many courts hold that capacity is governed by the *lex loci contractus*, even while they assert that some other law may

¹³ Hof Amsterdam (July 13, 1923) W.11163, N.J. 1924, 118. Belgium: Trib. comm. Bruxelles (Oct. 30, 1890) Pasirisie 1891.3.5.

¹⁴ BG. (Dec. 27, 1916) 42 BGE. II 553, 555; BG. (April 7, 1922) 48 BGE. I 24, 29.

¹⁵ German C. Civ. Proc. § 55; KG. (March 3, 1936) JW. 1936, 3570 (English minor), see *infra* p. 186, n. 38.

¹⁶ GOODRICH 266 § 105; Restatement § 333a; Milliken v. Pratt (1878) 125 Mass. 374, 28 Am. Rep. 241.

¹⁷ GOODRICH 267, excluding the possible influence of the intention of the parties, because a *circulus vitiosus* would result.

govern the obligation and validity (in other respects) of the contract.”¹⁸ At present, it is true that some courts of agricultural states are inclined to protect married women domiciled in the forum against their out-of-state creditors. This is scarcely a domiciliary rule; it represents rather a public policy of the forum in preference to a recognized conflicts rule. But the law of the domicil also has it advocates, especially when it agrees with the *lex fori*.¹⁹

In the less frequent cases relative to the capacity of infants, the law of the place where the infant acts is generally applied.²⁰ *Minor*²¹ explains the rule by the particular character of the infant's disability, evidenced by the fact that his contract is not void but only voidable; the infant is not incapable “in his person” but has a privilege to disaffirm the contract. Beale²² denies the existence of a status of minority at common law because “the effects of minority are not so uniform or clearly fixed as to be described as the incidents of a status.” These are obscure arguments. The true reason of the rule, commercial expediency, has been well indicated by Story himself²³ and has been accepted by the courts as necessary in a country where a large part of the population is constantly moving from one state to another.

In consequence of the rule, an individual reaching full age at his domicil, for instance at the completion of his eighteenth year or by marriage, is nevertheless treated as an infant, even at his domicil, with respect to transactions executed in a state where full age is attained only at twenty-one years of age.²⁴ Capacity for the purpose of contracts relative to immovables,

¹⁸ 2 BEALE § 333.3 at 1177.

¹⁹ Cf. *Union Trust Co. v. Grosman* (1918) 245 U. S. 412; STUMBERG 216; and *supra* p. 103, n. 7.

²⁰ GOODRICH 267.

²¹ MINOR § 72; cf. §§ 5, 11.

²² 2 BEALE § 120.11.

²³ STORY § 102 a, b, quoting *Burge*; cf. § 76 at p. 97, n. 2.

²⁴ *O'Dell v. Rogers* (1878) 44 Wis. 136 at 181 (majority of a woman conferred by marriage).

correspondingly, is governed by the *lex situs*.²⁵ And a decree based on a local statute, which in part removes an infant's disabilities for certain purposes, does not enlarge his capacity for acts in another state.²⁶

The American view²⁷ has been keenly observed in recent years in Europe²⁸ and has served as a major argument for the opponents of the traditional European approach.

The notion that capacity should not be separated from other problems of validity of contracts was once advocated by a few statistists, such as John Voet²⁹ and Bijkershoek,³⁰ and applied during the first half of the nineteenth century in Denmark.³¹

The rule that capacity to contract is simply determined by the law of the place of contracting is also said to prevail in the Soviet Union.³²

²⁵ *Beauchamp v. Bertig* (1909) 90 Ark. 351, 119 S. W. 75.

²⁶ *State v. Bunce* (1866) 65 Mo. 349 (authorization by Arkansas court); *Philpott v. Missouri Pacific Railroad Co.* (1884) 85 Mo. 164 (emancipation in Texas); *Beauchamp v. Bertig* (1909) 90 Ark. 351, 119 S. W. 75 (authorization in Oklahoma to sell).

²⁷ *Beauchamp v. Bertig* (1909) 90 Ark. 351, 119 S. W. 75; *Deason v. Jones* (1935) 7 Cal. App. (2d) 482, 45 Pac. (2d) 1025. This approach is consistently followed by the Restatement; capacity to contract is declared to be determined by the law of the place of contracting (§ 333); capacity to transfer land and chattels by the law of the situs (§§ 216 and 255, respectively), capacity to marry by the law of the place where the marriage is celebrated (§§ 121 ff.); see also the statement about capacity to be held responsible for a tort implied in § 379. With respect to the theoretical basis of BEALE's opinion, see his Summary, § 55, 522, and the criticism by WIGNY, *Essai* 19, 103.

²⁸ The American cases down to 1933 have been collected and analyzed by RUDOLF MUELLER, "Die Geschäftsfähigkeit natürlicher Personen in der international-privatrechtlichen Rechtsprechung der Vereinigten Staaten," 8 *Z.ausl.PR.* (1934) 885.

²⁹ See STORY § 54 a.

³⁰ BIJNKERSHOEK (1673-1743), 1 *Observationes Tumultuariæ* (edited by MEIJERS, DE BLÉCOURT and BODENSTEIN, 1926) no. 71 expressly invokes Joannes Voet. He applied the *lex loci actus* as to capacity to marry; see LEE, "Bijkershoek's *Observationes Tumultuariæ*," 17 *Journ. Comp. Leg.* (1935) 38 at 43.

³¹ See BORUM and MEYER, 6 *Répert.* 216 no. 21.

³² See MAKAROV, *Précis* 190.

2. Capacity Governed by Personal Law

Outside of the United States and the Soviet Union, problems of capacity are generally treated as belonging to the domain of personal law. Even in the United States, this approach is followed in Louisiana,³³ although it appears weakened recently.³⁴ A peculiar position is occupied by Switzerland, where problems of capacity are determined by the national law of the individual,³⁵ while problems of personal status in general are referred to the law of the domicil.

Since Mancini's time, the European rule has been justified upon the ground that the country of nationality is the one best qualified to determine whether and to what extent restrictions should be imposed upon the individual citizen in his own and his family's interest. Rules determining capacity are regarded as the very core of the rules that permanently determine an individual's legal status. It is obvious, of course, that incapacities accompanying an individual wherever he goes may endanger others who bona fide enter into transactions with him, but the principle is based upon the consideration that anyone who engages in a transaction with another must ascertain at his own risk whether such other party has sufficient legal capacity, or, as stated in the Roman maxim, *Qui cum alio contrahit, vel est vel debet esse non ignarus condicionis eius* (Dig. 50.17.19). (He who contracts with another either knows or ought to know the other's condition.) In interstate or international transactions, the results of this maxim are even harsher than in transactions involving parties both subject to the same law. While it may often be difficult to ascertain

³³ Marks v. Loewenberg (1918) 143 La. 196, 78 So. 444; Lorio v. Gladney (1920) 147 La. 930, 86 So. 365; National City Bank of Chicago v. Barringer (1918) 143 La. 14, 78 So. 134.

³⁴ See as to capacity to sue Matney v. Blue Ribbon, Inc. (1942) 202 La. 505, 12 So. (2d) 253, Note, 18 Tul. L. Rev. (1943) 319, 321.

³⁵ BG. (Nov. 21, 1908) 34 BGE. II 738, 741; BG. (May 23, 1912) 38 BGE. II 1, 4; BG. (Feb. 7, 1934) 61 BGE. II 12, 17 (2).

whether an individual is under age, married, or of unsound mind, it may be more difficult to find out that he is a foreigner and that his capacity is restricted by his personal law.

As a matter of fact, in order to alleviate embarrassments to national business life, exceptions to the rule have been found necessary for transactions contracted wholly within the territory of the forum.

(a) In the famous Louisiana decision, *Saul v. His Creditors*, it was recognized that a foreigner twenty-two years of age, a minor under the law of his domicile, could not plead this foreign law against a contract entered into by him in the state.³⁶ The same rule was adopted occasionally in other jurisdictions at a time when the law of domicile was held to govern capacity.³⁷

(b) In the Prussian and other German codes since the eighteenth century, the validity of transactions in which consideration is given and the capacity of standing in court, were in one way or another declared independent of foreign-created disabilities.³⁸ By the German law (EG. art. 7 par. 3), it is provided that a foreigner who engages in a transaction in Germany is considered to have the same capacity as he would

³⁶ *Saul v. His Creditors* (1827) 5 Mart. N.S. 569, 16 Am. Dec. 212, discussed by LIVERMORE, *Dissertations on the Questions Which Arise from the Contrariety of the Positive Laws of Different States and Nations* 32 § 17; STORY § 76; 1 WHARTON § 114ff.

³⁷ See in particular *Woodward v. Woodward* (1889) 87 Tenn. 644, 11 S. W. 892, 897.

³⁸ Prussian Allg. Landrecht of 1794, Einleitung §§ 35, 38, 39 provides that the rules of the Code shall be applied to foreign-domiciled persons engaging in contracts within the territory if these rules are more favorable to the validity of the contract than the laws of the domicile; cf. DERNBURG, 1 *Lehrbuch des Preussischen Privatrechts* (ed. 1, 1875) 46; Prussian Allg. Gerichtsordnung of 1793, I § 5: the capacity of a foreigner to stand in court is determined by the law of his domicile, § 6: but if he has completed his 25th year, it is immaterial whether the law of his domicile, or of the situs of the *res*, or particular acts that have not been presented to the court determine a later coming of age.

Baden: C. C. of 1808, art. 3 (a).

Saxony: C. C. of 1863, § 8.

Germany: Code of Civil Procedure (1877) § 53.

Greece: C. C. of 1856, art. 4 par. 2.

have if he were a German, even if his capacity be more limited under his own national law. This provision, designed to protect German business, is not applicable to transactions concerned with land outside of Germany, family relations, or inheritance, but applies to donations between living persons.³⁹ Moreover, this provision is strictly limited to transactions made within Germany, and does not protect anyone when he contracts in a foreign country. Varying provisions of this type have been adopted in numerous codes.⁴⁰

Another kind of rule of more general scope was contained in article 84 of the German Bills of Exchange Law of 1848, and now appears in the Geneva Conflicts Rules on Bills of Exchange and Promissory Notes of 1930.⁴¹ Article 2 reads as follows:

"The capacity of a person to bind himself by a bill of exchange or promissory note shall be determined by his national law. If this national law provides that the law of another country is competent in the matter, this latter law shall be applied.

"A person who lacks capacity, according to the law specified in the preceding paragraph, is nevertheless bound, if his signature has been given in any territory in which according to the law in force there, he would have the requisite capacity."

Under these provisions the signature is valid not only in the country where it has been made but also in every other country

³⁹ After removal of doubts, the Italian C. C. (1938) Disp. Prel. art. 7 par. 2, C. C. (1942) Disp. Prel. art. 17 par. 2 states the same rule, see *Relazione* 1938, no. 7.

⁴⁰ Switzerland: art. 7b, par. 1 of NAG. provides that a foreigner who has engaged in a transaction in Switzerland cannot plead his lack of capacity if he would have capacity under Swiss law.

Greece: C. C. (1940) art. 9.

Italy: C. C. (1942) Disp. Prel. art. 17 par. 2.

Japan: Law of 1898, art. 3 par. 2.

Iran: C. C. art. 962.

Liechtenstein: P.G.R. art. 24.

Montenegro: C. C. art. 788.

For Hungary see SZLADITS, 23 *Grotius Soc.* 1937, 25, 27.

⁴¹ See *supra* p. 34.

signatory to the Convention. The country of which the signer is a national is allowed, however, to treat the signature as invalid.⁴²

Under neither of these provisions does it matter by what law the contract is generally governed, of what country the parties are nationals, or where they are domiciled. Nor is it relevant whether the incapacity of the foreigner was known or unknown to the other party. A purely objective test is believed best to serve the interests of commerce; this policy of disregarding individual circumstances in laws intended to protect trade was consistently carried out in German law before 1933.

(c) A subjective test is applied in France, however, as established by the Court of Cassation in the celebrated *Lizardi* case.⁴³ A twenty-two-year-old Mexican, being still a minor under Mexican law, bought jewels in Paris; he would have been of full age had he been a Frenchman. The court, considering that the seller had acted "in good faith and without negligence or imprudence," declared the buyer bound by his contract. This decision has been followed consistently by the French courts.⁴⁴ Under this so-called "doctrine of national interest," protection is given against excusable ignorance of foreign incapacities, dependent upon the circumstances of each individual case.⁴⁵ Accordingly, the courts are disinclined to accord the benefit of the doctrine to bankers or other business-

⁴² Germany has availed herself of this permission: German Bills of Exchange Act of June 21, 1933, art. 91 par. 2, 2d sentence.

⁴³ Cass. (req.) (Jan. 16, 1861) S.1861.1.305.

⁴⁴ Cour Paris (Feb. 8, 1883) Clunet 1883, 291; Trib. civ. Seine (July 1, 1886) Clunet 1887, 178; Cass. (civ.) (Feb. 23, 1891) D.1892.1.29; Cour Paris (July 22, 1933) Gaz.Pal.1933.2.724, Clunet 1934, 910. In the last-mentioned case, a contract was made in France by a Rumanian married woman, who exhibited to the other party an instrument purporting to be a judicially legalized general power of attorney of her husband. The instrument was ineffective under Rumanian law. The court characterized the conduct of both spouses as "truly tortious" ("un véritable quasi-délit"). J. DONNEDIEU DE VABRES 509 in discussing this case, notes an increasing tendency of the courts to limit exceptions from the application of the personal law to such grave situations.

⁴⁵ This "serious defect" of the French solution has been admitted by 2 ARMINJON no. 21.

men who can reasonably be expected to investigate the personal status of their customers. Relief is generally granted, on the other hand, against a foreigner who fraudulently represents that he has his capacity.⁴⁶

This French approach is well-known throughout the Latin countries, but opinions are divided.⁴⁷

More emphatically than the French courts, the Swedish Law of 1904, as amended June 27, 1924 (c. 4 § 5), provides that transactions shall be valid in cases where the other party has not known of and has been unable to ascertain the incapacity.⁴⁸

(d) A combination of the German and the French rules has been undertaken in article 3 of the Polish Law of 1926 on private international law, prescribing that the capacity of a foreigner who lacks capacity under his personal law and who in Poland has entered into a transaction intended to have effect in Poland, is to be determined in accordance with Polish law when such determination is necessary for the security of honest commerce. This provision is as complicated and impracticable as that recently proposed by the Institute of International Law.⁴⁹

(e) These various exceptions to the principle of the personal law have resulted in widespread doubts on the propriety of the principle itself. Nevertheless, the only exception basically affecting the principle is the provision of the Uniform

⁴⁶ France: SURVILLE, *Clunet* 1909, 625.

Spain: Trib. Supr. (April 21, 1892) 71 Sent. 504.

Austria: Allg. BGB. §§ 866, 1041.

⁴⁷ Especially in Italy, the doctrine was not adopted by the courts and has been advocated by only a few writers, such as ANZILOTTI 153 no. 2; 1 FIORE no. 449. Now the German model has been followed, *supra* n. 39. In Belgium, PERROUD's hostile attitude (*Clunet* 1905, 305) has been followed by the authors of *Novelles Belges*, 1 D. Civ. 221 no. 157.

⁴⁸ The provision does not apply, however, against a foreigner who is a national of a state which is a signatory to the Hague Convention of June 12, 1902 (Ord. of Oct. 10, 1924).

In Norway, the domiciliary law is applied without exception. See CHRISTIANSEN, 6 *Répert.* 573 no. 99.

⁴⁹ Resolution of Cambridge 1931, *Annuaire* 1931, II 69-93, 237; cf. on Resolution of Oslo 1932, BAAK in *Revue* 1932, 820.

Geneva Conflicts Rules noted above. Other existing exceptions are intended strictly to protect businessmen (and not even all of them) operating in the state of the forum, while the rule shields the forum's own nationals who engage in transactions abroad.⁵⁰ Indeed, a German court would allow the plea of incapacity of a twenty-year-old Frenchman who contracts an obligation in Switzerland (because of the principle of nationality), although he would be barred from such a plea in a Swiss court (because of the Swiss provision, analogous to the German exception).⁵¹ On widely different theories, writers have criticized the exceptions as well as their limits.⁵²

3. Mixed Systems

(a) *English law.* No English decision has decisively settled the question whether an individual's capacity to contract is to be determined in accordance with his personal law, i.e., the law of his domicile, or in accordance with the "proper law of the contract." Dicta can be quoted for either approach.⁵³ The text writers increasingly tend toward advocating the application of the proper law of the contract insofar as mercantile transactions are concerned.⁵⁴ This opinion has been followed

⁵⁰ See for instance Trib. civ. Seine (June 30, 1919) *Clunet* 1920, 184 (a Frenchman who was placed under guardianship in France entered upon a contract abroad; when he was sued in France his defense of incapacity was sustained). Cf. also for Bulgaria, GHÉNOV, 6 *Répert.* 189 no. 48.

⁵¹ RAAPE 84, 85; PLANCK, 6 *Kommentar zum BGB.* (ed. 1) art. 7, no. 6 (d).

⁵² Cf. NIEMEYER, *Das IPR. des BGB.* 125; WALKER 111 ff.; LEWALD 59, no. 74; M. WOLFF, *IPR.* 63. Only NEUBECKER 62 believed that the exception stated by EG. art. 7 par. 3 could be extended by interpretation.

⁵³ For application of the domiciliary law: *Udny v. Udny* (1869) L. R. 1 Sc. App. 441, 457; *Sottomayor v. De Barros* (no. 1) (1877) 3 P. D. C. A. 1, 5; *Cooper v. Cooper* (1888) 13 App. Cas. 88.

For application of the proper law of the contract: *Sottomayor v. De Barros* (no. 2) (1879) 5 P. D. 94, 100, per Sir James Hannen; *Ogden v. Ogden* [1908] P. (C. A.) 46; *Chetti v. Chetti* [1909] P. 67; *Simonin v. Mallac* (1860) 2 SW. & Tr. 67, per Sir Cresswell Cresswell. Cf. also ALLEN, "Status and Capacity," 46 *Law Q. Rev.* (1930) 277 at 294, 309.

⁵⁴ DICEY 637 Rule 158 Exc. 1; WESTLAKE 40; CHESHIRE 217, who cites the Scotch case of *M'Feetridge v. Stewarts and Lloyds* [1913] S. C. (H. L.) 773, and the old and doubtful English case of *Male v. Roberts* (1800) 3 Esp. 163.

by a Canadian court.⁵⁵ Both Cheshire, who is the most vigorous advocate of this view among the text writers, and the Saskatchewan court seem to be influenced by American ideas. There remains, however, a twofold difference from the American rule: on the one hand, not all contracts are exempted from the law of the domicile; on the other hand, the law of the place of contracting is not followed unless it governs the whole of the contract. We shall have to examine this latter point when discussing the law governing contracts.

(b) *Former Italian system.* The rule that an individual's capacity is determined by his personal law is clearly established by the Italian Civil Code.⁵⁶ Hence, a contract made by a married woman of Italian nationality is held valid by the Italian courts, even if made in a country where a married woman cannot contract without her husband's authorization,⁵⁷ and her husband happens to be a national of that country. So far as mercantile transactions are concerned, however, article 58 of the Commercial Code of 1882 provided that capacity of the parties is determined by the law of the place of contracting.⁵⁸ The coexistence of these two different rules raised some minor problems that might have been overcome. But the fact that the two rules are theoretically antagonistic was much stressed. Recent critics have expressed their preference for the rule of the Commercial Code which is based upon the consideration that commercial transactions are concluded speedily and without the felt necessity of inquiring into the other party's nationality and capacity.⁵⁹ Nevertheless, the commercial rule has

⁵⁵ *Bondholders Securities Corp. v. Manville* [1933] 4 D. L. R. 699 (Sask.). Cf. FALCONBRIDGE, 3 *Giur. Comp. DIP.* 155, 156. There seems no doubt, on the other hand, that the law of the domicile governs capacity for engaging in other transactions, see 1 JOHNSON 183.

⁵⁶ Italy: C. C. (1865) *Disp. Prel.* art. 6; C. C. (1942) *Disp. Prel.* art. 17 par. 1.

⁵⁷ DIENA, *Clunet* 1920, 77. Under Italian law a married woman as such is no longer subject to any incapacity (Law no. 1176 of July 17, 1919).

⁵⁸ See DIENA, *Clunet* 1920, 79.

⁵⁹ See FORMIGGINI, 29 *Rivista* (1937) 39, 40 n. 1; he criticizes art. 2 of the Geneva Convention, where the national law is adopted as the general rule (see *supra* p. 187), as a step backwards.

been sacrificed to the nationality principle in the recently recast legislation.⁶⁰

III. PROBLEMS RAISED BY INCAPACITATING PROVISIONS OF THE LAW OF THE PLACE OF CONTRACTING

A peculiar problem arises when a person who is fully capable under his personal law makes a contract in a foreign country where persons of his class are not capable of contracting. This case presents no difficulty to a court which follows the personal law principle, as his personal law gives this individual capacity.

What, however, is the position in a court applying the law of the place of contracting? Does it consider the contract invalid?

This question has been discussed in connection with the former Italian commercial rule (C. Comm. art. 58), which established the principle of the *lex loci contractus*, as well as with reference to the exceptional rule contained in the Uniform Bills of Exchange Conflicts Convention. By prevailing opinion, it has been answered in favor of the validity of the transaction, in view of the basic function of the national law.⁶¹

The considerations involved may be illustrated by the following hypothetical case:

A Swiss national, twenty years old, having his domicile in Geneva, Switzerland, goes on a trip and buys a car on the instalment plan:

- (a) in Paris;
- (b) in London;
- (c) in New York.

Being of full age under Swiss law, he is considered of age in France under the nationality principle and in England under

⁶⁰ Art. 58 of the Comm. C. has been repealed by art. 112 of the R. D. of April 24, 1939, containing provisions for the introduction of the First Book of the Civil Code.

⁶¹ FORMIGGINI, 29 *Rivista* (1937) at 46 n. 2, *supra* n. 59.

the domiciliary principle (if applied), in respect to all three contracts. Therefore, he would probably be held capable also by an American court in cases (a) and (b), although this decision would amount to a sort of *renvoi*. In the third case, the *propositus* is incapable under the law of the place of contracting. It would hardly be correct within the meaning of the theory of vested rights to consider the full age required by the young man in his country as a "right." Such an approach has been refuted in analogous situations.⁶² In the case of a married woman who is incapable under the law of the place of acting, but capable under her domiciliary law, the American authorities tend to hold her incapable,⁶³ and contracts of a person of full age in his own state, who acts in a state where he is regarded as a minor, seem generally to be held voidable,⁶⁴ except under the domiciliary system of Louisiana.⁶⁵

A similar question arises where an American who is domiciled in the United States and is more than twenty-one years old, contracted an obligation in Chile, while the old law was in force under which minority lasted until the completion of the twenty-fifth year.⁶⁶

Must an American court prefer in these cases the place of contracting to the domicile? Lorenzen's⁶⁷ suggestion that capacity should be determined by domicile in international

⁶² See change of domicile, *supra* p. 148, n. 190.

⁶³ *Burr v. Beckler* (1914) 264 Ill. 230, 106 N. E. 206; *Nichols & Shepard Co. v. Marshall* (1899) 108 Ia. 518, 79 N. W. 282; *Pearl v. Hansborough* (1848) 28 Tenn. (9 Humph.) 426; criticized in 11 Col. L. Rev. (1911) 157; *DeFur v. DeFur* (1928) 156 Tenn. 634, 4 S. W. (2d) 341. Cf. 2 BEALE 674 n. 3.

⁶⁴ See 1 WHARTON § 114 and cases *supra* n. 27, probably not allowing the doubt expressed by 1 Wharton § 115a after n. 5.

⁶⁵ *Saul v. His Creditors* (1827) 5 Mart. N. S. 569, 16 Am. Dec. 212, states the case expressly, as similarly did *Woodward v. Woodward* (1889) 87 Tenn. 644, 11 S. W. 892, 897.

⁶⁶ C. C. art. 26, modified by Law no. 7, 612 of Oct. 11, 1943.

⁶⁷ LORENZEN, "Uniformity Between Latin America and the United States in the Rules of Private International Law Relating to Commercial Contracts," 15 Tul. L. Rev. (1941) 165 at 168, 170.

transactions, as contrasted with interstate business, would do justice in these situations.

IV. CONCLUSIONS

The proper approach to capacity problems in conflict of laws has been repeatedly discussed in recent years in Europe, and an approximation toward the American system of *lex loci contractus* has been advocated in various quarters. In particular, Batiffol who studied American conflict of laws in the United States, recommended in 1934 in the newly founded French Committee of Conflict of Laws, a cautious application of other criteria than nationality.⁶⁸ Some critics of the present European system have expressed themselves in favor of the proper law of the contract or, for special cases, that of the place of contracting, while others have wished to substitute the law of domicile for the national law.

The main argument against subjecting capacity to the law of the place of contracting or to the proper law of the contract is that either alternative greatly facilitates evasion of the statutory disabilities imposed by the domiciliary or national law. In addition, the domiciliary or national courts employing either conflicts rule are confronted by the dilemma whether to observe this rule and sanction evasions or to enforce their statutory provisions on grounds of public policy. Such a casuistic approach causes a great deal of uncertainty.

In this country, the uncertainty is somewhat mitigated by the circumstance that a sizable majority of the courts unqualifiedly prefer the law of the place of contracting to any domiciliary policy. Dissenting cases exist, however, and there is increasing emphasis on the interests of the domiciliary state.

⁶⁸ Travaux du Comité français de droit international privé, Première année, 1934, 21-66. Cf. BARBEY, *Le Conflit* 35; BATIFFOL 325 no. 363ff. *Contra*: J. DONNEDIEU DE VABRES 510, who defends the French case law, described above, p. 188, as infinitely more flexible and more richly detailed than the American system.

Moreover, if the advice of Cook were to be heeded, the picture would change. He recommends that statutes restricting the capacity of married women be examined to determine whether they involve only married women domiciled and acting within the state, or also foreign domiciled women acting in the state, or acts of locally domiciled women out of the state, or all these categories.⁶⁹ This suggestion seems to favor as narrow as possible a construction of the statutory prohibitions. Its effect would probably reduce the scope of the restrictions upon capacity, whether under the law of the place of contracting or under the law of domicile, whichever is applied. Nevertheless, statutes do not easily lend themselves to such construction; although the results may be beneficent, this method of inquiry would considerably complicate the task of the courts and, at least for the time being, render it more difficult to ascertain the validity of contracts.

A retrospective view of these various attempts to solve this old and not yet liquidated problem, indicates a compromise useful in all countries and adequate to all interests concerned, which also promises more definite results than those reached thus far in the two opposite camps. The transactions in which an incompetent individual participates should, by reference to an objective criterion, be divided into two groups: one in which local interests prevail sufficiently to justify the application of the law of the contract; another in which the domiciliary or national protective policies are entitled to be effectuated everywhere by means of the personal law. For the purpose of conflicts rules, business contracts already are distinguished from transactions regulating family relations and decedents' estates in the statutes of Germany, Switzerland, Poland, Italy, etc., as well as in the English doctrine, though particulars vary. Following this lead, capacity to engage in transactions should be determined, consistently and without exceptions, by the

⁶⁹ Cook, *Legal Bases* 438ff.

law governing personal status, when family relations and other personal matters are concerned, and by the law governing the contract in general, when exchange of property or services is involved. This approach, which would need to be elaborated more specifically, could be further refined by a carefully developed distinction between those incapacities which businessmen may justly be expected to investigate, and disabilities which may justifiably be ignored. Where the interests of third parties empirically appear worthy of protection, there should be no room whatever for interference by the personal law. *Vice versa*, the American rule extends the law of the place of contracting beyond any possible justification. It is even applied to the capacity to marry.

The law thus in part replacing the personal law should conveniently be the law governing the contract as a whole rather than the law of the place of contracting.⁷⁰ This is evident in the case where a contract is clearly localized in a place other than that of execution.

⁷⁰ Lorenzen's suggestion (*supra* n. 67) of a compromise between North and South American laws also tends toward the law governing the validity of contracts in general, rather than that of the place of contracting. He assumes, moreover, that the domicil of persons engaged in international trade is sufficiently stable to furnish a standard. The proposition above may not be far away from his idea.

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PART THREE

MARRIAGE

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CHAPTER 7

Marriage¹

I. ENGAGEMENT TO MARRY

No American case seems to be in point. We have to deal, therefore, with foreign conflicts rules only.

1. Groups of Conflicts Rules

UNTIL recently the problems arising out of an engagement to marry have received little attention in the conflict of laws. Insofar as they have been dealt with at all, their treatment has suffered from divergency of classification in the various municipal laws.

Numerous countries treat a betrothal as a contract pertaining to the field of family relations and similar to the contract of marriage itself. Where this notion prevails, as for instance, in England, Germany, Switzerland, the Netherlands, and the Scandinavian countries, the choice of law rules concerning the subject matter have been developed by analogy to those relating to marriage.² Formal requirements are accordingly treated as being determined by the law of the place of celebra-

¹ For surveys on the substantive marriage laws, see: HERMAN COHN, *The Foreign Laws of Marriage and Divorce*, Part I, *The Countries of the European Continent* (Tel-Aviv, 1937); LESKE-LOEWENFELD, *Rechtsverfolgung im internationalen Verkehr*, vol. IV, 1. Teil, *Das Eherecht der europäischen Staaten und ihrer Kolonien* (Berlin, ed. 2, 1932-1937); BERGMANN, *Internationales Ehe- und Kindschaftsrecht*, 2 vols. (Berlin, ed. 2, 1938-1940); Articles "Ehe," "Ehehindernisse," "Eheliches Güterrecht," "Ehescheidung und Ehetrennung," "Eheschliessung," "Ehevertrag," by different authors, in 2 *Rechtsvergl. Handwörterb.* (Berlin, 1929-1938); EVERSLEY's *Law of the Domestic Relations*, ed. 5 by ALEXANDER CAIRNS (London, 1937).

² In the United States also, the action for breach of promise is recognized as being "in form at least *ex contractu*," although damages are awarded as in tort matters. See DAGGETT, *Legal Essays* 44, 78.

In Italy the contract theory has been defended by FUNAIOLI, 9 *Annuario Dir. Comp.* (1934) 3, 383; 5 *Giur. Comp. Dir. Civ.* 55.

tion, whereas the intrinsic validity of an engagement to marry is determined in accordance with the personal law of the parties.³ Sometimes, however, an old view is still followed, according to which engagement and marriage are treated like ordinary contracts; consequently the conflicts rule concerning rescission of contracts is applied.⁴

The personal law is also applied for the determination of the consequences of a breach of engagement. In this respect the difficulties that arise wherever the parties have different personal laws are particularly noticeable, for the various national laws attach widely different consequences to a breach of promise to marry. Nowhere, it is true, will a promise to marry be enforced by a decree of specific performance,⁵ but with respect to the duty to pay damages the laws vary from non-recognition of any such duty to recognition of a duty to pay compensatory damages for special injury, damages for mental pain and suffering, or even punitive damages. In this wide variety of domestic laws, the two solutions most frequently advocated are to determine the extent of either party's liability (1) by his own personal law⁶ and (2) as limited to

³ Germany: the rule has been applied in all cases; for particular applications see footnotes *infra* n. 6 and n. 7.

Switzerland: App. Zürich (May 1, 1905) Bl.f.Zürch.Rspr. (1905) 247 no. 159 (in the absence of a federal conflicts rule resorting to the former Züricher Privatrecht. Gesetzbuch).

The Netherlands: Rb. Almelo (Dec. 2, 1925) W.11568, 3 Z.ausl.PR. (1929) 531; Rb. den Haag (April 11, 1935) W.1936, no. 409, 11 Z.ausl.PR. (1937) 204.

Iceland, Law of domicil, EYJÓLFSSON in 4 Leske-Loewenfeld I 761.

⁴ Switzerland: the law of the place of performance, identified with the common domicil of the parties and, in the absence of such, the intended first marital domicil; see BECK, NAG. 177 no. 76, followed by App. Luzern (Oct. 19, 1938) 36 SJZ. (1938-1939) 219 no. 150.

⁵ Even the mere unenforceable obligation to marry has disappeared from the canon law, still in force in several countries in Latin America and Eastern Europe, under the Codex Juris Canonici, c. 1017 § 3, which instead grants damages for rescission of an engagement without just cause.

⁶ OLG. Köln (Dec. 4, 1925) Leipz.Z.1926, 602, IPRspr. 1926-1927, no. 63; KG. (Feb. 23, 1933) IPRspr. 1934, no. 41; particularly KG. (Feb. 7, 1938) JW.1938, 1715, Nouv. Revue 1939, 260; KG. (Jan. 11, 1939) Dt. Recht 1939, 1012. See also 2 ZITELMANN 801; RAAPE 266, 270.

the extent to which liability is recognized by the personal laws of both.⁷ Both opinions are influenced largely by a regard for the law of the forum, for in most cases the personal law of the defendant is that of the forum.⁸

The majority of the countries following the French system, consider liability for breach of promise to marry to pertain to tort law. Consequently, in conflicts cases the law of the place of the wrong is held to be applicable,⁹ but no clear rules exist for the determination of the place of the wrong in such instances.¹⁰

The *Código Bustamante*¹¹ and other recent codifications¹² simply declare the law of the forum to be applicable.

2. Cases

The functioning of the various choice of law rules may be illustrated by the following cases, one hypothetical and one real.

(a) A Frenchman, engaged to marry a French girl, repudiates his promise, while both he and his fiancée are temporarily residing in Germany.

If an action for breach of promise is brought against him in a French court, German municipal law, as the law of the place of the wrong, would have to be applied. The fact, however,

⁷ OLG. München (March 13, 1929) IPRspr. 1929, no. 69; KG. (May 2, 1932) IPRspr. 1932, no. 66; see also NEUMEYER, IPR. (ed. 1) 19; M. WOLFF, Familienrecht (1928) § 7; also M. WOLFF, IPR. 115; LEWALD 77; 2 STREIT-VALLINDAS 272 n. 8.

⁸ Cf. the dicta quoted by 3 FRANKENSTEIN 46 n. 34; *ibid.* 47 n. 42. The Kammergericht, however, in its decision of Feb. 23, 1933, *supra* n. 6, applied the personal law of the Turkish defendant without regard to the law of the forum.

⁹ Trib. civ. Valenciennes (Dec. 19, 1935) Nouv. Revue 1936, 325 (French law applied to Polish parties living in France as the law of the place of wrong, and Polish personal law rejected).

¹⁰ In France receipt of a "letter of rupture" by the fiancée regarded as decisive: Trib. civ. Seine (June 16, 1936) Gaz. Pal. 1936.2.744.

¹¹ Código Bustamante art. 39.

¹² Finland: Law of Dec. 5, 1929, on certain family relations of international character, § 46. In the English case of Hansen v. Dixon (1906) 23 T. L. R. 56, English law was applied with scant justification.

that the German law treats liability for breach of promise to marry in the fourth book of the Civil Code, which is entitled "Family Law," has led a text writer¹³ to believe that French courts, in view of their treatment of breach of promise to marry as a tort, would apply not the rules applicable under the German classification, but rather the German rules on torts. Strange consequences would result from this view. The defendant could be held liable, only if shown to have been aware that his conduct would cause pecuniary damage to his fiancée and, furthermore, his behavior constituted a violation of good morals. Then the additional question might be raised whether this is to be determined by German or French standards. Obviously, the French court would do better to apply the rules of family law provided for the case in the German Civil Code.

If the case arose in a German court, the German judge would have to apply French law as the personal law of the parties; but inasmuch as the French law would regard the question as one of tort and refer it to the German law as the law of the place of the wrong, the German court would accept the *renvoi* so as to apply the provisions of the fourth book of the German Civil Code. Thus, although the courts in France and Germany would start from different premises, the decision would be the same in both.¹⁴

(b) An American citizen domiciled in New York, while temporarily residing in Germany, seduced a German girl by

¹³ RAAPE 267.

¹⁴ Decisions, subjecting one party to a law recognizing liability and the other to one which does not, are considered inequitable, by M. WOLFF, IPR. 115; *contra*, RAAPE, *loc. cit.* This latter author's more recent book (2 Deutsches Internationales Privatrecht 168, 170) proposes use of the choice of law rule applicable to obligations neither contractual nor delictual, i.e., roughly the quasi-contractual obligations of the common law, as once used by the Reichsgericht, (Oct. 21, 1887) 20 RGZ. 333 and (Feb. 28, 1889) 23 RGZ. 172, and by the Trib. Baselstadt (Sept. 9, 1891) 11 Z. Schweiz.R. N.F.64. There is, however, no choice of law rule generally recognized that can be used for the purpose. RAAPE's own suggestion is to apply the domiciliary law of the innocent or, alternatively, the female party. This, indeed, would be a universal rule.

promising to marry her and subsequently repudiated his promise. The German court denied the girl's action, holding that the German conflict of laws rules referred to the law of New York as the personal law of the defendant, under which actions for breach of promise to marry are not recognized.¹⁵

3. Public Policy

In those countries where choice of law rules refer the courts to some foreign law, the *lex fori* is frequently resorted to in order to prevent the enforcement of liabilities regarded as contrary to the public policy of the forum. In the Netherlands, for instance, damages allowed by German law for breach of the contract to marry could not be recovered unless the marriage banns, a prerequisite to such suits in the Netherlands, had been published.¹⁶ Enforcement of penalties agreed upon in the contract of engagement is generally denied.¹⁷ Some countries consider damages for breach of promise to marry, whether based on domestic or foreign law, as contrary to public policy.¹⁸ Even where public policy is resorted to more sparingly, doubts have been expressed with respect to such enormously high claims as are allowed in England and in some American states.¹⁹ A recent Finnish statute expressly limits the amount

¹⁵ New York Laws 1935, ch. 263 amending C. P. A. by inserting art. (2a). The German case is KG. (Jan. 11, 1939) Dt. Recht, 1939, 1012.

¹⁶ Dutch BW. art. 113 par. 2. See Hof s'Hertogenbosch (Jan. 5, 1932) W. 12416, 11 Z.ausl.PR. (1937) 204; Rb. Rotterdam (May 12, 1922) W.10996 and (July 27, 1932) W.12584, 11 Z.ausl.PR. (1937) 204. These decisions were criticized by VAN DER FLIER, Grotius 1927, 108; *ibid.* 1924, 123, at 125 and OFFERHAUS, Gedenkboek 1838-1938, 713, but recommended for Italian law by FEDOZZI 401.

¹⁷ Penalties are still used in Greece; see 2 STREIT-VALLINDAS 274. They are considered contrary to public policy by the German KG. (Jan. 23, 1901) 2 ROLG. 132, 11 Z.int.R. (1902) 99, Clunet 1902, 629 and by most other courts. *Contra*: 3 FRANKENSTEIN 45.

¹⁸ Norway: see LUNDH in 4 Leske-Loewenfeld I 717.

More often it is alleged that the law of the forum fixes the maximum damages that can be awarded, e.g.:

Italy: FEDOZZI 401.

Iceland: EYJÓLFSSON in 4 Leske-Loewenfeld I 761.

¹⁹ Against awarding: NUSSBAUM, D. IPR. 131 n. 2; 2 STREIT-VALLINDAS 274 n. 15; *contra*: DEMERTZES, Family Law 91, § 24, cited by STREIT-VALLINDAS; RAAPE 271.

recoverable to that allowed by both the plaintiff's personal law and the law of Finland.²⁰ On the other hand, a foreign law occasionally has been denied application because it failed to recognize a claim for damages for breach of promise to marry,²¹ to that extent frustrating the elimination of such suits by the so-called "heart balm" statutes. Almost all these applications of public policy are obviously arbitrary.

4. Conclusion

An Anglo-American writer recently suggested application of the foreign characterization of a breach of promise where the foreign systems of law applicable to the situation concur in characterizing it (as breach of contract or as tort), but where the engagement and the breach occur in two foreign jurisdictions having different characterizations, that the forum should apply its own characterization.²² This exception to the author's theory of *lex fori* characterization is inconsistent with any general theory, nor does it help in the more important cases.

It would be preferable for the conflicts rule to be free from interfering substantive law; the rule should simply refer the rights and obligations flowing from an engagement to the law of the place regarded under the circumstances as the center of the social relation between the parties at the time of engagement.

II. THE CONCEPT OF MARRIAGE IN THE CONFLICT OF LAWS

Experience has shown that marriage must be defined in the conflict of laws in broader terms than those in which it is

²⁰ Law of Dec. 5, 1929, § 46.

²¹ OGL. Köln, *cit. supra* n. 6; *contra*: M. WOLFF, IPR. 115 n. 4. The decision of the Kammergericht of 1939 (*supra* n. 6), declares expressly that the American statute denying a claim for seduction of a betrothed woman is not contrary to the international public policy of the court, though contrary to the German Civil Code.

²² ROBERTSON, Characterization 76-78, 177.

understood, legally and sociologically,²³ in the several systems of municipal law. Two groups of cases have been given practical consideration.

1. Soviet Marriage

In 1929 a man was sued in the Probate Division of the English High Court for separate maintenance by a woman with whom he had entered into an agreement of marriage in the Soviet Union. The defendant contended that this so-called marriage did not correspond with the English notion of marriage because, under the Soviet law at the time in question, such a marriage could be dissolved by the simple unilateral act of either party without the necessity of any reason being specified. Following this argument, Hill, J., held that the relation existing between the parties was not such as to constitute a marriage and, therefore, that the plaintiff was not entitled to recover. The Court of Appeals reversed this decision on the grounds that, although Soviet law may thus permit the relation to be voluntarily dissolved, the parties may be presumed to have intended it to be permanent. Thus, the relation created in the Soviet Union was not considered to be fundamentally different from the English notion of marriage.²⁴ The Supreme Court of Hungary, on the contrary, declared a Soviet marriage not in accord with humanity and ethics, constituting nothing more than concubinage.²⁵

²³ On the relation between the sociological and the legal concept of marriage and the function of law with respect to the regulation of sex relations, see LEWELLYN, "Behind the Law of Divorce," 32 Col. L. Rev. (1932) 1281, 33 Col. L. Rev. (1933) 249.

²⁴ *Nachimson v. Nachimson* [1930] P. 85; [1930] P. (C. A.) 217.

²⁵ Hungarian Royal Court (Feb. 23, 1926) P. III 1616/1926, German translation in *Z.f.Ostrecht* 1927, 620; *cf.* 5 *Zausl.PR.* (1931) 783, *Clunet* 1929, 1202; Hungarian Royal Court (Nov. 6, 1928) P. III 8411/27, *cf.* *JW.* 1931, 167 and the article by SZLADITS, "Some Features of Hungarian Private International Law," in 23 *Grotius Soc.* 1937, 25 at 34 ff.

In virtual agreement with the English Court of Appeals, the Reichsgericht recognized first a "recorded"²⁶ and later a "non-recorded" Soviet marriage,²⁷ considering it essential that, although the Soviet law does not recognize any mutual rights and duties between the spouses, yet they have intended to unite themselves for a life to be lived in common. The court, indeed, has felt it impossible to deny validity to all Russian marital unions.

The possibility that a marriage of non-Russians, and especially of persons subject to the law of the forum, might occur without formalities, was not at issue. This matter and the common law marriage will be discussed in connection with the formalities requisite for marriage.

2. Polygamous Marriage

Polygamous marriages formerly were absolutely excluded from recognition, inasmuch as English doctrine limits the notion of marriage to "Christian marriage," which is necessarily monogamous. On numerous occasions, however, British courts have had to concern themselves with the polygamous marriages of Mohammedans, Hindus, Chinese, and other peoples not belonging to the realm of Western civilization,²⁸ while in the United States Indian tribal marriages and those formerly practiced by the Mormons have been recognized. Whereas the celebration of such unions within the forum is rigidly prohibited, it is neither workable nor convenient to deny that foreign marriages of such a nature function within the territories of the peoples concerned.²⁹ Moreover, there is not sufficient public interest to do so in cases where the existence or nonexistence of a foreign marriage is only a consideration preliminary to the decision of a problem of property law, tax

²⁶ RG. (Oct. 22, 1930) JW. 1931, 1334 no. 1. Similarly Brazil: App. Rio de Janeiro (June 10, 1932) Clunet 1932, 1124.

²⁷ RG. (April 7, 1938) 157 RGZ. 257, 262, 265.

²⁸ For details see 2 BEALE § 121.1 and CHEATHAM, Cases 871 no. 5.

²⁹ See the basic exposition by KAHN, 1 Abhandl. 161 ff.

law, or some other matter not immediately affecting the *mores* of the forum.³⁰

III. FORMAL REQUIREMENTS OF MARRIAGE

I. Survey of Problems: Requirements of Form and Intrinsic Validity Distinguished

It has been customary from old times to permit foreigners to marry; the churches have not made distinction on account of nationality in the administration of marriage ceremonies. It is a singular exception to this usage that the French decree of 1938, mentioned earlier, disallows the marriage of foreigners unless they possess a police permit of sojourn for more than a year.³¹ On the other hand, nationals may marry abroad, although they may have to observe certain prescriptions of their national laws.

In legal systems outside of the United States, conflict rules distinguish the form and the intrinsic validity of marriage. The former is referred to the law of the place of celebration and the latter to the personal law of the parties. This difference is steadily gaining in favor in the literature of the United States.

Generally defined, the terms "formal requirements" and "formalities" of marriage mean the external conduct required of the parties or of third persons, especially public officers, necessary to the formation of a legally valid marriage. These formal requirements are distinguished from the substantive

³⁰ See GOODRICH 319. The cases are discussed by BECKETT, "The Recognition of Polygamous Marriages under English Law," 48 Law Q. Rev. (1932) 341; cf. FOSTER, "Some Defects in the English Rules of Conflict of Laws," 16 Brit. Year Book Int. Law (1935) 84, 88. An interesting discussion has been held in Canada: see FALCONBRIDGE, Annotation [1932] 4 D. L. R. 19 and *contra*: 1 JOHNSON 312. The view adopted in the text, as explained by FALCONBRIDGE in Rivista Dir. Priv. (1932) I 297-307, has been recommended for Italian use by FEDOZZI 456.

³¹ Circular letter of the Garde de Sceaux of Dec. 13, 1938 concerning the marriage of foreigners in France, J. Off. Jan. 6, 1939; cf. Nouv. Revue 1938, 935 and *supra* pp. 141, 142, n. 162.

conditions for validity such as age, race, religious affiliation, or health of the parties.

The purpose of the distinction in the conflict of laws is obvious. On the one hand, the personal law of the parties leaves the determination of formalities to the law of the place of celebration but reserves to itself the determination of the intrinsic conditions of marriage. On the other hand, the law of the place of celebration scrupulously takes into consideration the requirements of the personal law as to intrinsic conditions but disregards its prescriptions as to form.

The borderline between the two categories, however, is not traced uniformly in the various systems of municipal law. Although differences of such classification in the conflict of laws systems are not accentuated, there is sometimes a tendency to classify certain conditions precedent as substantive merely for the purpose of giving these conditions extraterritorial effect. This is a natural tendency where social policies or ecclesiastical conceptions are regarded as too important to be sacrificed in any instance, irrespective of where the marriage may be celebrated. Internationally relevant rules, however, should be expressed in an adequate common language. To deal with such divergences in classification, two methods are available. One is to let each court accept as formality what internal law regards as such; the ensuing chaos evoked criticism long ago.³² The other is to define the notion of formalities in a universally acceptable sense. As a matter of fact, although there seem to be four principal points which have occasioned difficulties for an international understanding, it does not appear that agreement to eliminate them would be impossible. These are controversial matters:

(a) Proclamation of banns and similar proceedings preliminary to the celebration of a marriage were occasionally

³² NIEMEYER in 26 Z.int.R. (1916) 3, MENDELSSOHN BARTOLDY, 22 Z.int.R. (1912) 364, and 3 FRANKENSTEIN 130, who attempt various other solutions. NIBOYET 732, however, follows the *lex fori*, though he is exclusively concerned with the point mentioned, *infra* p. 214.

classified in early times as substantive requirements. But it is now generally agreed that they are to be regarded as mere formalities. The same opinion prevails with respect to recordation and similar acts required under some laws when parties have married abroad.

(b) Except in England, the requirement of parental consent to the marriage of a minor is universally characterized as closely connected with the intrinsic requirement of consent of the party. The English qualification itself is open to criticism.³³

(c) Classification of the requirement of freedom from mistake has caused some writers difficulty.³⁴ Their doubts can be resolved easily when two different situations are kept separate. On the one hand, due form requires that the parties make their declarations at the time and in the words or by the conduct demanded by the applicable law. If, for instance, A says "no" but is understood to have said "yes," the law governing "formalities" should be resorted to in order to determine whether there exists a validly declared consent. On the other hand, whether a declaration of intention must be supported by an intention in fact or whether the declaration is to be considered valid even where the intention of the party does not coincide with his expression, is a matter which concerns the essentials rather than the formalities of the contract. Thus, if both parties use the correct ceremony but have secretly agreed to be married only nominally (simulation), the law governing substantial requirements should determine whether or not they are bound in marriage. This has been denied by canon and English law but affirmed by Italian law and the German Code before its amendment.³⁵

³³ See below, p. 267.

³⁴ CHESHIRE 346 classifies a "fundamental mistake" as pertaining to formalities and hence refers it to the law of the place of celebration, while he classifies "capacity" only as personal law. This reasoning neglects the essential distinction between intention and declaration of intention. In accordance with the text, e.g., JEMOLO, *Matrimonio* 97.

³⁵ See *infra* p. 272.

(d) The last and most discussed problem concerns the requirement made in some, but not all, of the states which still regard marriage as an essentially religious institution: that their subjects observe the religious ceremony even when they celebrate marriages abroad. In these countries, dependence on the religious rites is considered to affect the capacity of the parties and, hence, to be properly a matter of the personal law. In the rest of the world, comprising by far the majority of states, the religious celebration, whether indispensable or not, is treated as a formality. This point will be examined later.³⁶

The domain of formality as distinguished from that of procedure has been considered with respect to the rebuttable presumption of British law that a man and a woman having cohabited and having enjoyed the reputation of being married are deemed to have been duly married. A presumption of this kind has been characterized as relating merely to the manner of proof and therefore as a rule of procedure of the forum.³⁷ A contrary decision of British Columbia, however, has been defended³⁸ and seems to be the right answer. If the core of a law suit depends on whether a man and woman have been merely regarded as married in the eyes of their community or whether they were, by being so regarded or otherwise, legally married, then the essential elements constituting marriage are involved. Moreover, it would be impractical to try to submit to different conflicts rules the existence of a marriage by repute and the choice of facts determining the existence of such a marriage.

2. *Locus Regit Actum*

Formalities of marriage have been, from the middle ages, a particularly important field for the application of the maxim

³⁶ See *infra* pp. 214-216; cf. 232ff.

³⁷ See particularly FALCONBRIDGE, 3 *Giur. Comp. DIP.* 214.

³⁸ *Leong Sow Nom v. Chin Yee You* (1934) 49 B. C. R. 244, [1934] 3 W. W. R. 686, 3 *Giur. Comp. DIP.* no. 90, with approving note by CANSACCHI 213.

locus regit actum, a maxim not everywhere understood in quite the same sense nor applied with entire consistency. We may distinguish in the following survey three types of provisions:

(a) *Compulsory rule*. In one group of countries, including the United States,³⁹ England, Denmark, and Japan,⁴⁰ the law of the place where a marriage is celebrated is decisive, irrespective of whether the marriage be concluded within or without the territory of the forum. No other law is allowed any influence on the formalities of marriage. The personal laws of the parties are irrelevant, and the parties have no choice other than to select the place of celebration. In countries following this principle, the marriage ceremonies of their own countries or churches are not available to the parties, unless these formalities happen to coincide with those permitted at the place where they are being married.

Illustration: Under Danish matrimonial law a marriage may be celebrated before a minister of some religious denomination. But a marriage of two Danish subjects before a minister of their church in Berlin will not be recognized in Denmark because in Germany civil marriage is compulsory.⁴¹

(b) *Optional rule*. Most countries adhere to a double system: parties celebrating a marriage *within* the forum must comply with the domestic formalities; parties marrying

³⁹ For the state statutes see 1 VERNIER § 32; for the cases 2 BEALE 671ff.

⁴⁰ England: *Berthiaume v. Dastous* [1930] A. C. 79.

Denmark: BORUM and MEYER, 6 Répert. 218 no. 38, MUNCH-PETERSEN, 4 Leske-Loewenfeld I 745 n. 78.

Japan: Law of 1898, art. 13 par. 1 sentence 2.

The Austrian Supreme Court has held the same way beginning with a decision of March 11, 1913, 50 GlU. NF. no. 6345; see decisions of Sept. 20, 1927, 9 SZ. no. 127; Oct. 24, 1934, Zentralblatt 1935, no. 1; May 21, 1937, 66 J. Bl. (1937) 296; even after the conclusion of the Austrian Concordat with the Holy See, a marriage celebrated before a Catholic clergyman in a country where civil marriage ceremony is compulsory, is invalid in Austria; this decision, however, adds: "at least if one party is a foreign national." Cf. WALKER 666.

Presumably Liechtenstein, where Austrian marriage law is still in force, follows the same doctrine, but it has been ranged within the group described under (b) by an official German handbook; see BERGMANN, *Der Ausländer im Deutschen Recht* (1934) 66 n. 70.

⁴¹ See BORUM and MEYER in 6 Répert. 219 no. 40. See another example under (b).

abroad must observe either the formalities prescribed at the place of contracting or those of the personal law or laws.⁴²

This system also is adopted in article 7 of the Hague Convention on Marriage. Where the parties are of different nationalities, in accordance with the opinion prevailing in most countries,⁴³ the Convention provides, however, that a marriage not complying with the formal requirements in the country of celebration must satisfy the national laws of both parties in order to be recognized by other participant states.⁴⁴

The practical difference between the two systems described so far may be illustrated by a case decided a few years ago by the Privy Council. Two Catholics domiciled in the Province of Quebec participated in a marriage ceremony before a Catholic priest in Paris. The marriage was void in France but would have been good if performed in Quebec. The Judicial Committee of the Privy Council, speaking as the final appellate court of Canada, felt itself compelled to hold the marriage invalid.⁴⁵ If, however, the parties had been Swedes marrying in Paris before a minister of the Swedish Established Church, their marriage would have been held valid in Sweden.⁴⁶

An analogous question is apt to arise when a marriage by mere consent is invalid under the local law but may or may

⁴² Instead of the personal law, a former system had the law of the place of "performance," which was understood as the intended matrimonial domicile, as an alternative to the local law. In this sense the Law of the Baltic Prov., introd. art. XXXVI was applied in 1928 in Latvia; *cf.* BERENT in 4 *Leske-Loewenfeld* I 576 n. 211.

⁴³ See e.g., Austrian OGH. (May 21, 1937) 19 SZ. no. 166 (Austria was not a participant in the Hague Convention).

⁴⁴ An illustration of the difficulties arising from this rule is the decision of the German Reichsgericht (April 6, 1919) 88 RGZ. 191.

⁴⁵ *Berthiaume v. Dastous* (1929) [1930] A. C. 79, [1930] 1 D. L. R. 849, 99 L. J. (P. C.) 66. *Cf.* FALCONBRIDGE, Annotation [1932] 4 D. L. R. 8.

For the same reason Italian courts and writers consider a religious marriage of Italian Catholics in France invalid, even after the Concordat; see BALLADORE-PALLIERI, *Dir. Int. Eccles.* 211 against an isolated decision of Trib. Milano (April 27, 1938) cited by him.

⁴⁶ Sweden: Law of 1904 with amendments, c. 1 § 8 par. 1.

The problem is well known in Latin America; *cf.* 1 RESTREPO HERNÁNDEZ 110 no. 197.

not be recognized by a personal law which admits such marriages.⁴⁷

(c) *Rule modified by religious requirements.* The principle, *locus regit actum*, compulsory in every case under the first system described above, (a), and optional in foreign marriages under the second system described above, (b), is profoundly modified in a group of countries emphasizing the importance of religious rites. This group of countries, which is characterized by strong ties between the state and an established church, formerly included Turkey, Czarist Russia, and after the Russian Revolution the parts of Poland and Lithuania formerly in Russia. Today it embraces Palestine in part, Bulgaria, Greece, parts of pre-war Yugoslavia,⁴⁸ Egypt,⁴⁹ Malta, Cyprus,⁵⁰ Iran, and after 1938 with respect to Catholics also Spain.⁵¹

Since in these countries a religious ceremony is required, a marriage celebrated abroad by civil ceremony is not recognized. In Greece it was doubted whether this rule applied to citizens other than those of the Greek Orthodox faith, but it is now agreed that it includes Roman Catholics, Moslems,

⁴⁷ A third case where a marriage invalid under the local law could satisfy the requirements of the personal law is construed, quite hypothetically it seems, by BECK, NAG. art. 7f no. 36, and RAAPE 251 (b) par. 3.

⁴⁸ For details of the very complex legal situations, see the reports in 4 Leske-Loewenfeld I: on Serbia, by PÉRITCH at 982, (see also PÉRITCH in 40 Bull. Inst. Int. (1939) 1, 186, 41 Bull. Inst. Int. (1940) 1); on Croatia-Slavonia, by LOVRIČ at 1034; on Bosnia-Herzegovina, by EISNER at 1050; on Montenegro, by EISNER at 1056.

⁴⁹ Under their own law however, Moslems and Oriental Jews may marry simply before witnesses of their people without any religious ceremony; see GOADBY 148.

⁵⁰ For Cyprus see the facts in the English case of Papadopoulos [1930] P. 55 (*infra* n. 68); where only one party, however, is of the Greek Orthodox faith and the other a member of another church, certain difficulties have been cleared away by the Marriage (Validation and Amendment) Law, No. 3 of 1937, s.4 and s.5 (e).

⁵¹ Law of March 12, 1938; C. C. art. 42 allows marriage before the municipal judge to non-Catholic and such Catholic parties who declare not to practice the Roman Catholic religion.

and Jews.⁵² Moreover, it is held sufficient that one of the parties be of the Orthodox creed in order to necessitate the attendance of a priest (pope) of this denomination.⁵³

Grave complications are bound to occur when a national of a country where such an imperative rule is in force attempts to marry in a country where observance of a civil ceremony is indispensable.⁵⁴ The only certain way for the parties in such case to effect a valid marriage is to go through both ceremonies, the civil one prescribed by the local law and the religious rite required by the personal law.⁵⁵

It is noteworthy that this conflict is often designated by theorists as an insoluble conflict of qualifications. In connection with the idea that marriage is a sacrament to be administered in the proper way and with the attendance of the persons required by the particular denomination, it has been denied that these religious conditions of marriage can be treated like other forms of contract; rather must they be considered part of the personal status of the party concerned. This position was once taken by the Czarist Russian Church,⁵⁶ and it is so firmly rooted in Greece that in the new Civil Code the

⁵² See 2 STREIT-VALLINDAS 319 n. 36, who quotes the former opinions (317 n. 32).

The rule was generally applied in former Russia too; see MAKAROV in 4 Leske-Loewenfeld I 488, as well as under the Marriage Law of 1836 of the Kingdom of Poland until 1926. See *infra* n. 56.

On Lithuania see Z.f.Ostrecht 1931, 65; RUTENBERG in 4 Leske-Loewenfeld I 505.

⁵³ See 2 STREIT-VALLINDAS 310, 320 and the evidence in the case of Stathatos v. Stathatos (1912) [1913] P. 46.

For Bulgaria see KG. (Jan. 19, 1934) IPRspr. 1934, no. 16.

⁵⁴ See *infra* p. 232ff.

⁵⁵ Civil officials are required so to advise the parties in Prussia; see BERGMANN, *Der Ausländer im Deutschen Recht* (1934) 66 n. 70.

In Switzerland the parties must even give assurance that the religious ceremony will follow; see GMÜR, *Familienrecht* art. 118 n. 6.

⁵⁶ Decision of the Civil Department of Cassation (April 15, 1898) Decisions 1899, no. 39. This conception was maintained in Eastern Poland until the Polish Law on international private law of 1926, which made the law of the place of celebration govern the form of foreign marriages. But it took a decision of the Polish Supreme Court in Plenary Meeting on April 12, 1929 (Z.f.Ostrecht 1930, 512) to state that "forms" include the ecclesiastical manner of marriage; for details see OSTROWICZ, 4 Leske-Loewenfeld I 445 n. 252; WERMINSKI, Note, 6 Giur. Comp. DIP. no. 106.

necessity of a religious ceremony was not formulated as an exception to the maxim *locus regit actum*, since this maxim, applying to formalities only, does not include the necessity of a religious ceremony regarded as a substantive condition.⁵⁷ Formerly as well as recently,⁵⁸ some Western writers, too, have been greatly impressed by this characterization. For a time, French courts considered a civil marriage celebrated in France by a Greek Orthodox or Catholic foreigner, if not recognized in his homeland, invalid even under French law.⁵⁹ But no such concessions to foreign laws are made any longer by any country requiring its own subjects to observe a civil marriage ceremony. The true reason for this attitude is not, or at least should not be, any method of characterization.⁶⁰ By classification as "mere" form, the secular ceremony is not degraded but, on the contrary, is emphasized as the objective of an intransigent public policy, quite as cogent as the mandatory requirement of a religious ceremony. Indeed, those countries that regard ecclesiastical acts either of marriage or divorce, even in the case of foreigners, as private transactions without legal effect so far as the state is concerned, have been accused of intolerance.⁶¹ Nevertheless, while, on the one hand, the dominant American conflict rules concerning marriage minimize the personal law of the parties, it certainly is not clear, on the other hand, why the forum should yield to the pretensions of foreign countries to regulate local marriage ceremonies.

The problem of classification in this case is not more than a mere question of terminology. For the purpose of technical

⁵⁷ MARIDAKIS, 11 Zausl.PR. (1937) 121. For complete literature see 2 STREIT-VALLINDAS 318.

⁵⁸ UNGER, 1 System 210; 2 FIORE no. 528; PERROUD, Clunet 1922, 5; 1 FRANKENSTEIN 524; 3 *ibid.* 133; RAAPE 253. *Contra*: 1 BAR § 169; WALKER 662 n. 55, and in I KLANG's Kommentar 337; NEUMANN-ETTENREICH and SATTER in 4 Leske-Loewenfeld I 206 and particularly BALOGH, 57 Recueil 1936 III 685-702.

⁵⁹ See *infra* p. 218, n. 69.

⁶⁰ NIBOYET 731 no. 623, applies this very method.

⁶¹ 3 FRANKENSTEIN 137.

understanding in matters of international law, it is submitted, religious marriage, including the participation or mere presence of an ecclesiastical officer, like any secular solemnization, constitutes a formality in which the contract is "clothed." This conception is traditional in almost the whole world and has been confirmed for the Catholic Church by the *Codex Juris Canonici*, which clearly distinguishes form of celebration (c.1094-1103) from impediments (c.1035-1080) and defects of consent (c.1081-1093).⁶² For international terminology, such a common denominator of formalities is the only convenient one. Formalities have more than one function—among others, those of guaranteeing the finality and seriousness of the solemnized act, of publicizing the marriage, and of furnishing trustworthy evidence of its occurrence. All such purposes are common to any kind of marriage ceremony. Furthermore, the fact that an omission of the prescribed words or acts may adversely affect the validity of the transaction is not peculiar to religious marriage. At any rate, the policy of Greece, Bulgaria, and the other countries enumerated above on page 213, is sufficiently summarized by saying that these countries regard the religious form as essential for all marriages of their nationals.

3. The Law of the Place of Celebration as Applied to Domestic Marriages

General rule. In spite of doubts occasionally expressed, the almost general rule is that a marriage celebrated within the

⁶² The same classification has, quite naturally, now been confirmed by the Italian writers on the Catholic marriage with civil effects, established by the Concordat of 1929 with the Holy See, BOSCO, "Le Nuove leggi sul matrimonio," 22 *Rivista* 1930, 363, 372; FEDOZZI 418 n. 2. To the same effect in other Catholic countries, see in 6 *Répert.*; for Austria: KUNZ, 110 nos. 199-201; for Belgium: JANNE 149 nos. 46-48; for Brazil: BEVILAQUA 166 no. 39. This means that a purely ecclesiastical ceremony of Austrian Catholics in Italy was invalid in Austria, despite canon marriage being the prescribed form in the Austrian Allg. BGB.; see for instance OGH. (May 21, 1937) 66 J.Bl. (1937) 296, and below, p. 233, n. 137.

territory of the forum is invalid, unless the formalities prescribed by the matrimonial law of the forum are satisfied. The forms of marriage which a state places at the disposition of the parties are available to foreigners and citizens alike, but no other forms are allowed. If the law of the place of celebration leaves the parties free to choose between solemnization by a minister of the gospel or a priest and solemnization by a civil officer, a judge, or a civil commissioner, as is done in almost all Anglo-American countries, Sweden, Italy,⁶³ and others, foreigners can easily satisfy both the local and the personal law by choosing that ceremony which will be recognized by their personal laws. Hardships may arise where civil marriage is compulsory at the place of celebration.

The rule that the domestic formalities are exclusive is expressly contained in the following statutes, among others:

Germany, EG. art. 13 par. 3.

Hungary, Marriage Law of 1894, § 113.

Italy, C.C.(1865) art. 103; C.C.(1942) art. 116.

Poland, Law of 1926, art. 13 par. 1.

Sweden, Law of 1904, c.1 § 4 par. 1.

Switzerland, NAG. art. 7c par. 2.⁶⁴

Brazil: Introductory Law of 1942, art. 7 § 1.

Soviet Union, Family laws of 1926 of Russian Soviet Republic, art. 136; of Ukraine, art. 107 par. 2.⁶⁵

Ordinarily the rule is treated as unquestionable and justified as being required by elementary public policy.⁶⁶ Every

⁶³ The form of marriage ceremony provided for by the Italian Concordat with the Holy See, viz., and ecclesiastical marriage recorded by the state civil registrar, is available to foreigners, according to the general opinion, which is contested, however, by BALLADORE-PALLIERI, *Dir. Int. Eccles.* 220.

⁶⁴ To this effect BG. (Oct. 6, 1883) 9 BGE. 449, 453; Just. Dep. April 30, 1924, BBl. 1924, II 25; BBl. 1940, 1462 no. 9 (no marriage by proxy for foreigners prevented from entering Switzerland); HUBER-MUTZNER 434; *contra*: STAUFFER, NAG. art. 7c no. 26.

⁶⁵ FREUND in 4 *Leske-Loewenfeld* I 366; MAKAROV, *Précis* 331ff.

⁶⁶ Cf. 2 FIORE no. 541; ROLIN, *Principes* 79ff. nos. 576, 578, 581; TRÍAS DE BES, 6 *Répert.* 252 no. 101; 1 RESTREPO HERNÁNDEZ 109 no. 196.

state is said to have decided, after careful deliberation, whether marriages shall be solemnized in religious or temporal form, or parties shall be permitted to marry without any formality at all. From this point of view, it is understandable that states should not wish to see exceptions made within their territories in favor of aliens. Not quite so obvious, however, is the necessity of permitting foreigners to avail themselves of local ceremonies which are at variance with their personal laws. Doubtless, it is believed appropriate to render marriage possible for alien residents.

An exception to the general rule requiring marriages celebrated within the country to comply with the prescribed formalities is that of foreigners in Greece who are permitted, according to an old doctrine, to avail themselves of all public solemnizations provided for by their personal laws. This rule permits all sorts of religious and consular marriages, excluding, however, simple consensual contracts of the common law or Soviet type.⁶⁷

Illustrations:

(a) *Validity of marriage in municipal form:* In the English case of *Papadopoulos v. Papadopoulos*, P., domiciled in Cyprus and belonging to the Greek Orthodox church, married a woman of French nationality before a registrar in London in compliance with the formalities of English law. His marriage was held valid in England, although it was not recognized in Cyprus because not celebrated in a church by a priest of the Orthodox church.⁶⁸

There is abundant authority to the same effect in other countries.⁶⁹

⁶⁷ Cf. 2 STREIT-VALLINDAS 306, 315.

⁶⁸ [1930] P. 55.

⁶⁹ Belgium: Cass. (Jan. 19, 1852) *Pasicrisie* 1852. 1. 85; Antwerp (July 3, 1939) 9 *Rechtsk. Wkbl.* 1939, 44.

France: In a series of decisions beginning with App. Douai (Nov. 18, 1903) *Clunet* 1904, 394, down to a particularly objectionable decision of the Trib. of Metz (Oct. 30, 1929) *StAZ.* 1930, 198, the marriage has been held invalid if the formalities of the personal law were not observed. More recently, however, the trend favoring territoriality rather than the personal law has won the upper hand, and it is now well established that a marriage celebrated in France in ac-

(b) *Invalidity of religious marriages not provided for by the municipal law:* Thus, in a German case, Jewish subjects of Czarist Russia went through a religious ceremony in Germany before a rabbi. Although good in Russia, the marriage was held nonexistent in Germany, as no ceremony was performed before a civil officer.⁷⁰ Similarly, a marriage was celebrated in Germany according to religious formalities by a Greek and a Serbian subject. Although valid in both Greece and Serbia, the marriage was held nonexistent in Germany.⁷¹

(c) *Invalidity of common law marriage:* Two American citizens from New York live together as husband and wife in Belgium without a marriage ceremony. Belgian courts will hold the marriage invalid.⁷²

Apparent exceptions. Obviously, it is not inconsistent with the rule of compliance with local formalities for France and Spain to authorize or compel⁷³ their nationals in their respective colonies to marry in compliance with the formalities of the mother country.

Neither is it an exception, when a French court applies Spanish law in deciding whether or not a French woman has

cordance with the French formalities is valid, while a marriage celebrated in France in accordance with religious formalities is invalid. See Trib. civ. Seine (Nov. 20, 1912), aff'd Cour Paris (Dec. 22, 1921) in Clunet, 1922, 135; Trib. civ. Seine (Jan. 7, 1922), aff'd Cour Paris (Nov. 17, 1922) Clunet 1923, 85; Trib. civ. Nice (June 26, 1923) Clunet 1924, 670. All writers agree.

Germany: RG. (Dec. 17, 1908) 70 RGZ. 139; RG. (Nov. 16, 1922) 105 RGZ. 363; OLG. Dresden (March 13, 1911) 7 Sächs. Arch. (1912) 272 and OLG. Dresden (Nov. 9, 1933) IPRspr. 1934, no. 46.

Switzerland: BG. (Oct. 6, 1883) 9 BGE. 449, 453.

⁷⁰ OLG. München (March 10, 1921) 42 ROLG. 98. To the same effect: RG. (2d criminal section, Dec. 10, 1912) 18 DJZ. 1913, 588; Bay. ObLG. (March 22, 1924) 23 Bay. ObLGZ. 56.

Belgium: Trib. civ. Bruxelles (Jan. 31, 1925) Pasicrisie 1925.3.129.

Switzerland: BECK, NAG. art. 7c no. 86.

⁷¹ RG. (3d criminal section, Feb. 16, 1914) Leipz. Z. 1914, 869.

⁷² Belgium: POULLET 469 no. 365.

⁷³ In French Morocco, the Dahir of 11-13 of August, 1913, declared that Frenchmen and foreigners are unable to marry except in accordance with the formalities permitted by their national law or those which will eventually be determined for *P'état civil* in the French Protectorate. The latter formalities have been determined by the Dahirs of Sept. 4, 1915, and Sept. 13, 1922, to be identical with those of the Civil Code. Since then, the French form of marriage is compulsory for French nationals, as the Court of Cassation held in two decisions of March 3, 1937, Revue Crit. 1938, 86, 88.

acquired Spanish nationality by marrying a Spanish citizen in France. The court may find that the marriage is invalid under Spanish law because the religious ceremony was not observed and that therefore the wife has not become a Spanish citizen, although it is certain that the marriage is valid in France.⁷⁴

The Japanese Civil Code limits its own provision to the marriage of nationals without mentioning the marriage of foreigners. Probably, foreign parties may use any formalities agreeing with their national law or laws.⁷⁵

Consular marriages performed within the forum. Where a consular or diplomatic agent is endowed by the state represented by him—the sending state—⁷⁶ with the power of officiating at marriages, a marriage performed before him is valid in the receiving state only if the latter state has agreed to his acting in this capacity. Numerous marriages celebrated in an embassy or consulate have been declared invalid by the courts of the countries involved, because this function of the diplomatic agent or a priest officiating in a legation was not recognized.⁷⁷ Hence, for instance, a marriage celebrated by two British subjects before a British consul in Germany is

⁷⁴ Trib. civ. Seine (Jan. 19, 1920) Clunet 1920, 198; (Nov. 19, 1920) Clunet 1921, 184; (March 29, 1928) Clunet 1929, 402. Comments expressing controversial opinions by PERROUD, Note, Clunet 1929, 404, and J. DONNEDIEU DE VABRES 455. See *supra* p. 137.

⁷⁵ See BATY, "The Private International Law of Japan," in 1 *Mélanges Streit* (1939) 103 at 106.

⁷⁶ Where a marriage was celebrated before the consul of Guatemala in Paris and it appeared that, according to the law of Guatemala, representatives of that state had no authority to officiate at marriages, the act was declared null also under French law. Trib. civ. Seine (March 15, 1932) *Revue Crit.* 1935, 436.

⁷⁷ Austria (one party Austrian): OGH. (Aug. 17, 1880) 18'GIU. no. 8066, Clunet 1881, 171.

Belgium (one party Belgian): Trib. Antwerp (Aug. 4, 1877) Clunet 1881, 84.

France (one party French): Trib. civ. Seine (July 2, 1872) S.1872.2.248, Clunet 1874, 71; Trib. civ. Seine (Sept. 2, 1920) *Revue* 1921, 165 n.2; (June 21, 1873) Clunet 1874, 73; cf. *infra* n. 83, and Note AUDINET, S.1924.2.65. See also the case of Hay v. Northcote [1900] 2 Ch. 262, 69 L. J. (Ch.) 586, where the English court, though referring to a French judgment which had declared the marriage void, held it valid under English law.

Italy: App. Firenze (July 31, 1877) *Ann. Giur. Ital.* 1877, 3, 283 (an

held nonexistent in Germany,⁷⁸ though it is considered good in England.⁷⁹

Although some states are unwilling to consent to this function of diplomatic agents, numerous treaties embody agreements to recognize consular marriages performed within territory of the forum.⁸⁰ In some countries, consent is deemed to be given even without any express declaration. This is the case in Belgium, Bolivia, Brazil, Bulgaria, Greece, Peru, Roumania, Spain, Turkey, and elsewhere,⁸¹ particularly in France, where by "traditional customary law"⁸² foreigners belonging to the same country are permitted to marry before their consul. This liberal exception to the French system does not extend, however, to religious marriages before a priest or chaplain attached to a diplomatic mission, sanctioned in former times by the so-called freedom of the Chapel. Hence, French courts

American man and an Italian woman at an American consulate); see also Trib. Roma (May 6, 1936) Giur. Ital. 1936, I, 2, 465.

Switzerland: Just. Dep. BBL. 1924, II 25, no. 5; Answer of Federal Council to the British Legation, BBL. 1911, I 431, no. 12, where it is added that the British Legation in a note showed its willingness to make British consuls in Switzerland conform to the Swiss conception.

Spain: Trib. Supr. (July 12, 1899) 66 Sent. 169 (Frenchman at the Anglican Church of Puerto Rico, then a Spanish colony).

See, furthermore, Rb. Rotterdam (June 17, 1935) W. 1936, no. 633 (Egyptian consul). Decisions relating to Portuguese, Turkish, and Russian consulates; cf. 3 FRANKENSTEIN 170 n. 176.

⁷⁸ German EG. art. 13 par. 3.

⁷⁹ British Foreign Marriage Act, 1892, § 1.

⁸⁰ See *infra* p. 238; see also the Colombian Law, No. 266, of Dec. 21, 1938.

⁸¹ Belgium: Cour Bruxelles (May 29, 1852) Pasicrisie 1852.2.237; Note, Clunet 1907, 335, 339; POULLET 470 no. 366.

The Bolivian Law of December 15, 1939; continues to recognize marriages celebrated by diplomatic or consular agents of foreign powers, but requires recording in the register of civil status.

Brazil: Lei de Introdução (1942) art. 7 § 2.

Bulgaria: GHÉNOV, 6 Répert. 191 no. 63.

Greece: 2 STREIT-VALLINDAS 315.

Peru: customary law for Catholics and Congressional Act of Dec. 23, 1897, art. 7 for non-Catholics (on the condition of subsequent registration).

Roumania: Trib. Ilfov (March 21, 1890); see PLASTARA, 7 Répert. 66 no. 183.

Spain: Trib. Supr. (Feb. 21, 1935) 217 Sent. 567 implicitly; see TRÍAS DE BES 85 no. 118.

Turkey: see SALEM, 7 Répert. 267 no. 218.

⁸² WEISS, 3 Traité 563.

have invalidated a marriage celebrated before an Orthodox priest of the Greek legation in Paris and a marriage celebrated before a Protestant minister authorized by the King of Sweden.⁸³

The validity of consular marriages as determined by the law of the sending state will be discussed in connection with other foreign marriages.⁸⁴

4. The Law of the Place of Celebration as Applied to Foreign Marriages

In general. All states, except those which require a religious marriage for their nationals abroad and, to a certain extent, Spain, recognize as valid a foreign marriage celebrated in compliance with the formalities prescribed by the local law.⁸⁵ Such compliance is compulsory according to the English and American conflicts rules but optional under the laws of most other countries.

⁸³ France: Circulaire du Garde des Sceaux, Aug. 27, 1879, Bull. Off. Min. Just. 1879, 146; Trib. civ. Seine (June 6, 1893) Clunet 1893, 880; Trib. civ. Angers (July 27, 1896) and App. Angers (May 31, 1898) Clunet 1898, 911; Cass. (civ.) (July 30, 1900) S.1902.1.225, D.1901.1.317, Clunet 1900, 969; App. Douai (Feb. 2, 1899) Clunet 1899, 825. The marriage of two Greeks, celebrated according to their religious formalities at their legation, was held valid by Trib. civ. Seine (Nov. 20, 1920) Revue 1921, 226, but the judgment was reversed, Cour Paris (March 1, 1922) S.1924.2.65; cf. ARMINJON, Revue 1926, 169; AUDINET, 11 Recueil 1926 I 209.

Spain: Trib. Supr. (July 12, 1889) 66 Sent. 169 (French parties in the Anglican chapel of Puerto Rico).

⁸⁴ *Infra* pp. 236-240.

⁸⁵ In most countries this rule is not questioned.

In Soviet Russia the statutes are interpreted to the same effect by FREUND in 4 Leske-Loewenfeld I 366, with some reservations, however.

In Spain the Supreme Court held on May 1, 1919, 146 Sent. 176 and again on April 26, 1929, 188 Sent. 1286 concerning Spanish couples having married in Argentina and Habana respectively, that non-Catholic Spaniards may marry only in accordance with Spanish formalities before a Spanish consul or vice-consul; LASALA LLANAS 107 and TRÍAS DE BES, in 31 Recueil 1930 I 654, 673, and in his Sistema español de derecho civil internacional, nos. 111, 112 state this to be the actual law, but restrict the unwelcome rule to the cases where both parties are of Spanish nationality, or the man is a Spaniard and the woman is not a national of the country of celebration. Moreover, in a country prohibiting consular marriage the parties are believed to be free to choose the local ceremony.

For Eastern Poland, see *supra* n. 56, and for Turkey, SALEM, 7 Répert. 268 no. 221; but cf. GOULÉ, Mariage, 8 Répert. nos. 41, 288, and 382.

The local form, including the proper officer⁸⁶ and the proper ceremony, must be observed in its entirety as determined by the law of the place of celebration.⁸⁷ In Morocco, Egypt, and parts of China, religious ceremonies are customary but dependent on certain conditions with which foreigners accordingly have to comply in order to satisfy their national laws. On the other hand, Swiss authorities recognize a Japanese temporary marriage (the famous Madame Butterfly marriage), entered into by a Swiss national, as valid without time restriction, the Swiss law disapproving such restriction.⁸⁸

Under the Concordat of 1929 between Italy and the Holy See, Italians may marry in Italy either in accordance with the Civil Code or in accordance with the ecclesiastical ("canonic") formalities, provided, however, that the ecclesiastical marriage is recorded by an Italian civil officer.⁸⁹ Since this alternative does not exist outside of Italy, a marriage of Italian nationals abroad before a Catholic priest is not valid, even under the Italian conflicts law, unless it has been performed in accordance with the formalities established by the forum.⁹⁰

Special problems: (a) *Common law marriages.* Since some formal marriage ceremony is required in almost every European country,⁹¹ the question has been presented whether the principle of *locus regit actum* could be extended to a common law marriage of nationals of a European country cele-

⁸⁶ Where a French Catholic woman married an orthodox Serb in a Catholic church in Yugoslavia, the marriage was held invalid in France, because according to the local law it should have been celebrated before an orthodox priest; see Trib. civ. Seine (Feb. 22, 1937) *Revue Crit.* 1937, 650.

The American decision in *In re Lando's Estate* (1910) 112 Minn. 257, 127 N.W. 1125, is based upon the same principle. The court was mistaken, however, when it interpreted EG. art. 13 par. 3, as permitting a marriage in Germany before a minister of a religious community. Cf. KESSLER, 1 Z.ausl.PR. (1927) 865 n. 1.

⁸⁷ 2 BEALE § 121.4; § 122.1.

⁸⁸ Just. Dep., BBl. 1925, II 143.

⁸⁹ Hence, an unrecorded religious ceremony performed in Italy will not be considered sufficient by a foreign court; cf. Austrian OGH. (May 21, 1937) 19 SZ. no. 166.

⁹⁰ See BOSCO, 22 Rivista (1930) 469ff.; FEDOZZI 419ff.

⁹¹ Except in Soviet Russia and until recently in Scotland.

brated in a jurisdiction where common law marriage has not been abolished. Despite objections, the validity of common law marriages celebrated in the United States has been upheld not only by English courts ⁹² but also for their respective nationals by the courts of Belgium, France, Germany, and Italy.⁹³ Gretna Green marriages, too, have been recognized in England ⁹⁴ and other countries.⁹⁵

Furthermore, recorded marriages entered into by non-Russians in Soviet Russia have been recognized in other jurisdictions,⁹⁶ and even non-recorded marriages have been declared valid by the German Reichsgericht on the ground that it was often difficult for German parties resident in Russia to reach a German consulate.⁹⁷ The court stated, however, that

⁹² *Rooker v. Rooker* (1863) 3 Sw. & Tr. 526; *In re Green*, *Noyes v. Pitkin* (1909) 25 T. L. R. 222.1 JOHNSON 299, however, has express doubts concerning the validity of such marriages celebrated by domiciliaries of Quebec who go abroad for this purpose.

⁹³ Belgium: Trib. Antwerp (Jan. 13, 1886) J. d. Trib. 1886, col. 311; App. Bruxelles (July 29, 1909) Clunet 1912, 583; POULLET 462 no. 360; WIGNY, 58 Revue Dr. Int. (Bruxelles) (1931) 341 at 346.

France: Continually so held since Cass. (req.) (Dec. 20, 1841) S.1842.1.321; see WEISS, 3 Traité 531; Cass. (req.) (Jan. 13, 1857) S.1857.1.81; Trib. civ. Seine (April 20, 1891) Clunet 1891, 932; Trib. civ. Seine (Aug. 3, 1894) Clunet 1895, 374; Trib. civ. Seine (Jan. 17, 1924) Revue 1925, 226; Cour Paris (Nov. 20, 1928) Clunet 1929, 1050.

Germany: RG. (Oct. 26, 1932) 138 RGZ. 214, 218, IPRspr. 1932, no. 8 at 25; LG. Tübingen (July 25, 1934) JW. 1934, 2802, IPRspr. 1934, no. 57 at 130; RG. (April 7, 1938) 157 RGZ. 257 at 262, JW. 1938, 1716.

Italy: Trib. Ariano (Feb. 4, 1898) and App. Napoli (March 31, 1898) cited by FEDOZZI at 426 n. 1, who himself requires that the conclusion of the marriage be proved by an act of consent, excluding inference from the subsequent conduct of the parties.

⁹⁴ *Compton v. Bearcroft* (1769) 2 Hag. Con. 444; *Bach v. Bach* (1927) 43 T. L. R. 493 (by implication).

⁹⁵ Prussian Obertribunal (Jan. 15, 1855) 29 Entsch. Kgl. Ob. Trib. 380 no. 51.

⁹⁶ Czechoslovakia: S. Ct. (1931) no. V. 10.644, 6 Zausl.PR. (1932) 448.

France: Trib. civ. Seine (June 17, 1927) Revue 1928, 332 (Spanish man and Russian woman.)

Germany: RG. (Oct. 22, 1930) JW. 1931, 1334, IPRspr. 1931, no. 57; RG. (Oct. 26, 1932) 138 RGZ. 214 at 217, IPRspr. 1932, no. 8 at 25.

Switzerland: see BECK, NAG. 222 no. 12.

⁹⁷ RG. (April 7, 1938) 157 RGZ. 262 at 265.

strict proof that the marriage was a true marriage and intended to be permanent was necessary in each case.⁹⁸

(b) *Tribal marriage*. As a rule, marriages of white persons, in accordance with the formalities of uncivilized native tribes, are not recognized.⁹⁹ Colonial practice has, however, recognized various exceptions.¹⁰⁰

(c) *Marriage by proxy*. Marriage by proxy, where permitted by the law of the place where the proxy participates in the marriage ceremony, has been recognized in the United States.¹⁰¹ A Turkish immigrant to the United States, for instance, was allowed to marry by proxy a woman living in his native country, thus enabling her to join him in this country.¹⁰² A similar case was that of a German prisoner of war in Morocco who married by proxy an Austrian woman in Austria.¹⁰³ Although section 124 of the Restatement requires only that the absent party consent to the marriage, Continental courts seem to require also that this consent be expressed in

⁹⁸ 138 RGZ. at 218; 157 RGZ. at 266.

⁹⁹ *In re Bethell, Bethell v. Hildyard* (1888) 38 Ch.D. 220. *Contra*: Cour Paris (April 24, 1926) D.1927.2.9 held void a marriage of a French explorer in Mongolia and an American girl before a Belgian Catholic missionary, as Mongols do not use religious marriages. This was, however, an unusual case due to the remote place, see ESCARRA, *ibid.*; *infra* n. 179.

¹⁰⁰ On French practice in Indo-China and Tunisia, *cf.* J. DONNEDIEU DE VABRES 447. On marriages of white persons and Indians in the United States and Canada see GOODRICH 319; 1 JOHNSON 320-327. On the very precarious position of a white woman marrying a native in the British Empire or even a member of an Oriental religion or of a Hindu caste, *cf.* memorandum of the British Foreign Office transmitted by the British Consul in Berlin, printed in StAZ. 1923, 31; see also 2 BERGMANN, 75.

¹⁰¹ See Restatement § 124. See LORENZEN, "Marriage by Proxy and the Conflict of Laws," 32 Harv. L. Rev. (1919) 473, 484.

¹⁰² *Cf.* GOODRICH 303; United States *ex rel. Modianos v. Tuttle* (1926) 12 F. (2d) 927; see also Clunet 1929, 205. It is true that according to s. 28 (n.) of the Immigration Act of May 26, 1924, the terms "wife" and "husband" do not refer to a proxy or picture marriage, but on the interpretation see HACKWORTH, 2 Digest of International Law (1941) 367 s. 164. On the contrary, Canadian federal and province authorities do not recognize any marriage by proxy for the purpose of immigration; see note of the Canadian Government to the German Government, 2 BERGMANN 78.

¹⁰³ Opinion of the Saxon Government of May 24, 1916, cited by LEWALD 86 no. 117.

advance in an instrument in writing, stating the name of the other party. Provisions to this effect are contained in some codes, as for instance the Austrian and the Cuban¹⁰⁴ and, for soldiers, in the new Italian Code.¹⁰⁵

If these precautions are taken, there is no room for the objection that marriage by proxy does not fulfill the requirement of consent. The party for whom the proxy acts must observe the regular form of consent. The proxy himself is no more than a messenger, and whether or not a party may express his consent by messenger is clearly a matter of formality.¹⁰⁶

Prevention of secret marriages. Elaborate precautions have been taken in the municipal laws of Western and Central Europe to prevent prohibited and secret marriages. Marriages may not be celebrated without prior publication of banns, and after celebration all marriages must be recorded by civil officers. These acts, both that preceding and that following the main ceremony, are regarded as formalities¹⁰⁷ and, therefore, as a general principle, are governed by the law of the state of celebration.¹⁰⁸

(a) *Provisions by the state of celebration.* To prevent prohibited and secret marriages numerous countries endeavor to make sure that the marriage is not prohibited by the personal law of the parties. Thus, banns are required to be published not only at the place of celebration but also in the country or

¹⁰⁴ Allg. BGB. § 76, first sentence. Consent of government also required.

Cuba: C. C. art. 87.

In the Netherlands, BW. art. 134 requires royal permission.

¹⁰⁵ C. C. (1942) art. 111.

See also the German war-time provisions of the period of 1914-1918.

¹⁰⁶ Cf. RAAPE 176, 255; but also 3 FRANKENSTEIN 154.

¹⁰⁷ It is not true, as often alleged, that banns are considered part of the formalities only in Germany but not in France.

¹⁰⁸ This principle is followed in Switzerland by the regulation of banns in the case of a foreign marriage of Swiss nationals; no banns are required unless the authorities at the place of celebration ask for a Swiss certificate showing no known impediment to marry, in which event banns are published for the purpose of granting the certificate. See BBL. 1899, I 361 no. 4; *id.* 1912, I 507 no. 15; BECK, NAG. art. 7c no. 95.

countries where the parties reside or have resided at some time prior to their marriage. Foreigners are commonly not permitted to marry unless they can show a certificate of their own country that no impediment to the marriage is known.¹⁰⁹

(b) *Banns prescribed by the personal law.* In addition, some countries have established analogous provisions for their nationals abroad. Under the French Civil Code, which contains the prototype of all such regulations, a French national who intends to marry in a foreign land must, under certain circumstances, have banns published in France, particularly if he has resided in France in the six months preceding his marriage.¹¹⁰ The Code itself imposes no sanction for the performance of this duty. The courts, however, have pronounced null the marriages of parties who intended to keep their marriage a secret in France or who intended to evade the prohibitions of French law.¹¹¹

Although the provisions of the French Code have been copied by Italy, the Netherlands, and other countries, few of these countries¹¹² have followed the French decisions directed

¹⁰⁹ See below, p. 284.

¹¹⁰ C. C. arts. 170 and 63.

¹¹¹ Cass. (req.) (March 28, 1854) S.1854.1.295; Cass. (req.) (Nov. 20, 1866) S.1866.1.442; Cass. (req.) (March 8, 1875) S.1875.1.171; Cass. (civ.) (June 15, 1887) S.1890.1.446; Cass. (req.) (July 5, 1905) Clunet 1906, 1145, S.1906.1.141, Revue 1905, 714; Cass. (req.) (Jan. 3, 1906) Clunet 1906, 1149, Revue 1907, 211; and particularly Cass. (civ.) (July 13, 1926) S.1926.1.263. Cf. on this peculiar practice NIBOYET 725ff. no. 616.

¹¹² To the same effect as the French decisions:

Belgium: C. C. art. 170 as amended by law of July 12, 1931, art. 13. (Seems clearly to require observance of the local foreign formalities only.)

Quebec: Durocher v. Degré (1901) 20 S. C. 456, criticized by Charbonneau, J., in Hébert v. Cloutre (1912) 41 S. C. 249, 258ff.

Contra: Italy: C. C. (1865) art. 100 par. 2; C. C. (1942) art. 115; the consequence of omission is not nullity but only a penalty, Cass. Napoli (June 26, 1883) Legge 1884.1.14; App. Messina (Nov. 9, 1927) cited by FEDOZZI 419 n. 2; Trib. Pesaro (June 14, 1928) 21 Rivista (1929) 420. Cass. (Aug. 2, 1935) Rivista Dir. Pubbl. 1936, II 204.

The Netherlands: BW. art. 138 requiring banns is generally understood as meaning banns in the Netherlands. Non-compliance was believed to result in a nullity but not since the decision of the H. R. (May 31, 1872) W. 3484 and the Law of July 7, 1906, S. no. 162, art. 6.

Hungary: Marriage Law of 1894, § 113 par. 2.

against *fraude à la loi*, since the French courts have interpreted these provisions in their peculiar manner and have assumed discretionary powers of doubtful validity.

In reconciling these variations, the Hague Convention on Marriage provided that the requirements of the national law concerning publication must be observed, with the proviso that omission of publication does not invalidate the marriage except in a state whose law has been violated.¹¹³

(c) *Recordation prescribed by the personal law.* A French national who has married abroad, moreover, must have his marriage recorded at his French place of residence within three months after his return to France.¹¹⁴ This provision of the French Code has likewise been widely imitated.¹¹⁵ No sanction is provided,¹¹⁶ except that the Portuguese provision that a foreign marriage can be proved only if recorded in compliance with law,¹¹⁷ has had some following.¹¹⁸

A steadily increasing number of states in this country require residents who go elsewhere to be married and who

¹¹³ Hague Convention on Marriage of 1902, art. 5 par. 3, followed by Sweden, Law of 1904, with subsequent amendments, c. 1 § 4 par. 2.

¹¹⁴ French C. C. art. 171, no cause of nullity; App. Aix (Dec. 20, 1900) Clunet 1903, 639; Trib. civ. Seine (Oct. 27, 1921) Clunet 1921, 940.

¹¹⁵ Belgium: C. C. art. 171.

Haiti: C. C. art. 156.

Italy: C. C. (1865) art. 101.

Eritrea: C. C. art. 112.

Monaco: C. C. art. 139.

The Netherlands: BW. art. 139.

Neth. Indies: C. C. art. 84.

Nicaragua: C. C. arts. 106, 525.

Venezuela: C. C. (1942) art. 103.

¹¹⁶ See for Belgium: App. Liège (April 8, 1925) Clunet 1926, 502; Italy: Cass. Palermo (Aug. 5, 1905) Foro Ital. 1905, I, 1443; 1 Rivista (1906) 586; App. Messina (Nov. 9, 1927) see *supra* n. 112.

¹¹⁷ Portugal: C. C. art. 2479 and Law of Dec. 25, 1910, arts. 60, 61. CUNHA GONÇALVES, 1 Direito Civil 685 explains that the marriage is considered valid as to effects in the country of celebration, and with respect to bigamy even in Portugal.

¹¹⁸ The similar view of the former C. C. of Peru, art. 159, has been abandoned in the C. C. of 1936; cf. APARICIO Y GOMEZ, 2 Código Civil, Concordancias 324 and 356 (14).

Mexico: C. C. art. 161 par. 2 is characteristic of laws declaring that the civil effect of the marriage is retroactive to the time of the celebration only if it is recorded within three months.

return to reside within the state, to file a certificate of their marriage with the proper officer.¹¹⁹

In the Soviet Union, a circular of the Commissariat of Justice of the U.S.S.R. required all Soviet nationals marrying abroad to have their marriages recorded at the office of the diplomatic or consular representative of the U.S.S.R. But the code of only one Soviet Republic, the Ukraine, has expressly declared compliance with this provision essential for recognition of the marriage.¹²⁰

Defective celebration. The law of the place of celebration establishes the formalities and what constitutes failure to comply with them. It is universally agreed that the same law also determines the effect of such failure of compliance on the validity or invalidity of the marriage.

It is interesting that this principle is more firmly settled than two broader principles of which it would seem to be an application.

First, it is fairly well established, although not without some opposition, that the same law determines the causes as well as the effects of the nullity of a marriage.¹²¹ This broader rule, which includes formal and substantive requirements for marriage, has been adopted by the Restatement § 136:

"The law governing the right to a decree of nullity is the law which determined the validity of the marriage with respect

¹¹⁹ Maine Rev. Stat. (1930) c. 72 § 7, as amended by Laws of 1933, c. 24 § 1; New Hampshire Rev. Laws (1942) c. 337, § 7; *id.*, c. 338, § 30; North Carolina Gen. Stats. (1943) § 51-2, as amended by Public Laws 1939, c. 375; Vermont Pub. Laws (1933) § 4093; Virginia Code Ann. (1942) § 5077; West Virginia Code Ann. (1937) c. 48 § 4692 [14].

¹²⁰ Circular letter of July 6, 1923, no. 144, *The Weekly for Soviet Justice* 622; Ukrainian Family Law of 1926, art. 105; this provision seems not to apply, however, unless both parties are Soviet citizens. *Cf.* FREUND, 4 *Leske-Loewenfeld* I 366-9. Dr. V. Gsovski states that the requirement is not in any recent Soviet code and seems not to have been enforced.

¹²¹ Germany: RG. (June 22, 1931) 133 RGZ. 161, IPRspr. 1931, no. 23; OLG. Düsseldorf (Oct. 31, 1922) JW. 1923, 191; KG. (Jan. 29, 1934) DJZ. 1934, 1158, IPRspr. 1934, no. 16.

France: Ch. civ. Douai (March 28, 1928) *Clunet* 1929, 400; Ch. civ. Montpellier (June 21, 1928) *Clunet* 1929, 1062, cited by GOULÉ, 9 *Répert.* 82 no. 423.

The Netherlands: see MULDER 38, 109.

Switzerland: see GAUTSCHI, 27 *SJZ.* (1930-1931) 321. 325.

to the matter on account of which the marriage is alleged to be null."

In England these problems are ordinarily discussed under the heading of jurisdiction. If, however, a marriage has been celebrated abroad, English courts are prepared to respect the jurisdiction of the *forum loci actus*, and therefore the result now stated for the first time in modern form by Cheshire is the same as that in other countries.¹²²

Second, the results of a formally defective transaction of any kind are said to be determined by the law whose formalities have not been properly observed.¹²³

Although both general rules, and particularly the second, have been opposed on the ground that either the law of the forum or the *lex causae* should prevail, in the particular case of a formally defective marriage the rule is virtually unchallenged.¹²⁴ The forms of marriage vary too much, indeed, for one jurisdiction to determine the sanctions for violating the formal requirements of another.

Consequently, the law of the place of celebration determines whether or not a defect is material to the validity of the marriage and, if so, whether it renders the marriage nonexistent, void, voidable, or annulable (whatever may be meant by these terms); whether an omission can be cured by some additional act, as for instance, recording or factual cohabitation; and whether or not an annulment has retroactive effect.¹²⁵

¹²² See *Salvesen v. Adm'r of Austrian Property* [1927] A. C. 641; CHESHIRE 346, 347.

¹²³ See GOODRICH § 106; 2 ARMINJON, no. 49.

¹²⁴ NIEMEYER, *Das IPR. des BGB.* 115, RAAPE 183, 1 FRANKENSTEIN 561, 3 FRANKENSTEIN 183, and MANNL, 11 *Zausl.PR.* (1937) 786, have advocated the *lex causae*. RAAPE 186, and MANNL, however, admit that this theory is impracticable for marriages, and it has been formally rejected "at least with respect to the conclusion of marriage" by the Reichsgericht (June 22, 1931) 133 RGZ. 161, 165. Likewise, J. DONNEDIEU DE VABRES 461 seems to agree that the Court of Montpellier (*supra* n. 121) was right, although he defends the predominance of the personal law in determining sanctions for defects in marriages in general. In still another opinion, it was thought that the law more favorable to the marriage should be followed, but no decision seems to have applied this illogical thesis.

¹²⁵ RG. (June 22, 1931) 133 RGZ. 161, 165.

There are, of course, exceptions to the rule. The most significant exist in Switzerland. According to article 131 of the Swiss Civil Code, no marriage may be annulled on the ground of a formal defect, if it has been celebrated before a public marriage officer. Nor may a Swiss court annul a marriage, unless the ground of nullity is also recognized by Swiss municipal law.¹²⁶ Thus, a Swiss court will not annul a foreign marriage of Swiss nationals celebrated before a public officer, although a formal defect invalidates the marriage under the local law, nor will a foreign annulment in such case be recognized in Switzerland.¹²⁷

Another exception exists in France. On the theory of "possession of status" (*possession d'état*), article 196 of the Civil Code prohibits an annulment on the ground of formal defect, when the marriage is commonly reputed to exist and the record of celebration before a civil officer can be produced. While the Court of Cassation has refused to apply this provision to marriages celebrated abroad,¹²⁸ there is a tendency to extend it to all marriages celebrated before a French civil officer and to all marriages of French nationals.¹²⁹

Where the conflicts rule of the national law makes observance of the local ceremonies optional, a celebration, defective under the law of the place of celebration, may be considered valid in the homeland.

Evasion of formalities. Apart from the requirements of some countries concerning publication and recording by their nationals (see above at page 227), parties are generally free to choose for an intended marriage a place anywhere in the world and may thus avoid the formalities prescribed in their own country:

¹²⁶ NAG. art. 7f par. 2.

¹²⁷ BECK, NAG. art. 7f no. 172.

¹²⁸ Cass. (req.) (May 9, 1905) D.1905.1.367, Revue 1905, 349; followed by Cour Paris (May 15, 1931) Gaz.Pal.1931.2.262; Trib. civ. Seine (March 15, 1932) Revue Crit. 1935, 436.

¹²⁹ PILLET, 1 Traité 563 no. 265; LEREBOURS-PIGEONNIÈRE 381 n. 1.

"No exception is made to the principle even where the sole object of the parties in marrying in a foreign country has been to evade some troublesome formal requirement of their *lex domicilii*." ¹³⁰

This is a rule well recognized in England and in all other countries not prescribing compulsory religious marriage.

An occasional exception exists where, as in Arkansas,¹³¹ a marriage out of the state is not recognized, unless the parties actually resided in the foreign state or country at the time of the marriage.

5. Religious Ceremony Considered Essential by the Personal Law

Point of view of the personal law: (a) *Foreign civil marriage.* Those countries which consider marriage essentially a religious institution, such as Bulgaria, Greece, Liechtenstein, *et cetera*,¹³² treat as null and void a marriage celebrated abroad by one of their own subjects in accordance with civil formalities. This rule has been expressed repeatedly by the highest authorities of Czarist Russia¹³³ as well as by the attorney general of Greece,¹³⁴ who in an opinion stated that such a marriage is simply nonexistent, i.e., that anyone may invoke its invalidity, no decree of nullity being necessary.

The Hague Convention on Marriage (art. 5 par. 2) expressly reserved to the states prescribing religious formalities the right to treat marriages celebrated abroad by their nationals in disregard of such prescriptions as invalid.

¹³⁰ CHESHIRE 325.

¹³¹ Pope's Dig. Stat. (1937) § 9023.

¹³² See *supra* p. 213.

¹³³ Decisions of the Cassation Departments, penal, 1889, no. 2; civil, 1899, no. 39; of the first Plenary Meeting of the Senate, Aug. 12, 1911; Circular of the Ministry of Foreign Affairs to the Russian Representatives in Germany of February 25, 1889, no. 1384; Decree of the Consistorium of St. Petersburg, May 20, 1911; cited according to MAKAROV, 4 Leske-Loewenfeld I 488 n. 105.

¹³⁴ Opinion of Mr. GIDOPULOS, procurator at the Areopague, to the Ministry of Justice, no. 54 (Dec. 28, 1936) Clunet 1937, 902; for the literature and cases in point see 2 STREIT-VALLINDAS 317 n. 32.

(b) *Foreign religious marriage.* Under Greek law a Greek national may marry abroad in accordance with the formalities of his church, no matter what the local law provides.¹³⁵ A similar rule was in force for subjects of Czarist Russia.¹³⁶ In other countries, such as Croatia, which is governed by the older Austrian law, a foreign marriage of Catholic nationals must comply with the formalities established by the Catholic church at the place of celebration.¹³⁷

Point of view of the local law. Where a Bulgarian national marries before a civil officer in Germany and does not go through an additional religious ceremony, the marriage is valid in Germany and invalid in Bulgaria.¹³⁸ This situation is apt to give rise to puzzling problems under the law of the country where the celebration took place, i.e., Germany. It has been held that such a "limping marriage" (*matrimonium claudicans*) can be dissolved by a German decree of divorce, although generally divorce presupposes a marriage valid under the personal law of the parties.¹³⁹ In this case, the grounds for divorce are fixed exclusively by German law. But many related questions are open to discussion. What happens if one of the parties marries another person in Bulgaria? Is he or she punishable for bigamy in Germany? And shall it be held that remarriage is allowed even in Germany, since German law provides that a person's capacity to marry is determined by his national law?¹⁴⁰ Prevailing German opinion is to the effect that the marriage ought to be binding in Germany in every

¹³⁵ 2 STREIT-VALLINDAS 321: a Greek may marry a Bulgarian girl before an Orthodox priest in Germany.

¹³⁶ MAKAROV, 4 Leske-Loewenfeld I 488; MAKAROV, Précis 325.

¹³⁷ See LOVRIČ, 4 Leske-Loewenfeld I 1031, 1034.

This seems to be the rule in Colombia also, as art. 12 of Law 57 of April 15, 1887, declares that marriages celebrated according to the Catholic rites produce all civil and legal effects. Cf. 1 RESTREPO HERNÁNDEZ III no. 202.

¹³⁸ See *supra* n. 69.

¹³⁹ Cf. KG. (Dec. 11, 1933) JW. 1934, 619.

¹⁴⁰ EG. art. 13 par. 1.

respect, the personal law notwithstanding.¹⁴¹ Furthermore, if the female party to the marriage was a German national, she has, on account of the marriage, lost her German nationality, though she has not acquired that of Bulgaria.

While the same basic principle with regard to an English marriage was clearly adopted in English precedents such as the *Papadopoulos case*, a strange modification was caused by recognizing a marriage annulment pronounced at the husband's foreign domicile for the mere reason that the marriage lacks the proper ecclesiastic form. Hence, after such foreign annulment, the wife cannot obtain her rights as a spouse nor can she sue for divorce.¹⁴² This attitude of the English courts has been influential in Canada and Scotland.¹⁴³

Another problem concerns the consequences of such a marriage, valid under the law of the place of celebration and invalid under the personal law. Are marital property rights and other incidents of the marriage governed by the personal law of the parties,¹⁴⁴ although this law treats the parties as not married? The more reasonable answer seems to be in the affirmative,¹⁴⁵ because this is just the normal consequence of considering the parties married.

Point of view of third countries. What is the position of a third country when a conflict arises between the state of celebration and the national or domiciliary state of the parties?

The answer is clear when the third state adopts *locus regit actum* as the absolute binding rule, which is the case in Great Britain and the United States. A marriage celebrated by a

¹⁴¹ See LEWALD 111 no. 158; NUSSBAUM, D.IPR. 162; 3 FRANKENSTEIN 214; MASSFELLER, Das grossdeutsche Ehegesetz (ed. 2, Berlin, 1939).

Contra: RAAPE 383, 400.

¹⁴² See KEITH, "Some Problems in the Conflict of Laws," 16 Bell Yard (1935)

15.

¹⁴³ See *infra* p. 422.

¹⁴⁴ Cf. EG. arts. 14ff.

¹⁴⁵ See RAAPE 1 D.IPR. 180, in conflict with KG. (May 3, 1937) JW. 1937, 2523, and several writers.

Greek citizen before a city recorder in San Francisco¹⁴⁶ is certain to be recognized in England. On the other hand, a religious marriage of the same man celebrated in France would be considered invalid in the United States, because it is invalid in France.

Where, however, a court must follow the national law of the parties, ascribing to the law of the place of celebration only an optional role, it is doubtful which law is applicable when they are in conflict. Prevailing opinion favors the solution afforded by article 5 of the Hague Convention on Marriage according to which a marriage formally valid at the place of celebration is formally valid in all third countries, the national country alone being entitled to consider it void because of the lack of a religious ceremony. On the basis of this rule, the Reichsgericht recognized as valid in Germany a marriage celebrated before a civil officer in Brazil between a Turkish national of Roman Catholic faith and a stateless woman who had once been a national of Prussia, non-recognition of the marriage under existing Turkish law notwithstanding.¹⁴⁷ It also upheld a marriage entered into before a Norwegian civil officer by a Greek national of Orthodox faith and a Norwegian woman.¹⁴⁸ The Swedish statute and the *Código Bustamante* have adopted the same rule,¹⁴⁹ and French and Belgian decisions are to the same effect.¹⁵⁰

¹⁴⁶ Case of OLG. Hamburg (Nov. 15, 1926) Hans.GZ. 1927, Beibl. 4, IPRspr. 1926-1927, no. 28.

¹⁴⁷ RG. (April 6, 1916) 88 RGZ. 191.

¹⁴⁸ RG. (Oct. 1, 1925) JW. 1926, 375, IPRspr. 1926-1927, no. 27. See also OLG. Karlsruhe (April 18, 1917) 35 ROLG. 343; OLG. Hamburg (Nov. 15, 1926), *supra* n. 146.

Contra: RAAPE, 253, 172; 3 FRANKENSTEIN 160.

¹⁴⁹ Sweden: Law of 1904 with amendments, c. 1 § 6.

Código Bustamante art. 41.

¹⁵⁰ Belgium: Antwerp (April 20, 1927) Clunet 1928, 488; (Pole whose national law required religious ceremony and Belgian woman marrying before the registrar in London): Trib. civ. Bruxelles (Jan. 31, 1925) Clunet 1926, 500.

France: Trib. civ. Seine (Feb. 15, 1922) Clunet 1922, 396; Trib. civ. Seine

In the opposite case of a marriage invalid in form under the law of the place of celebration, article 7 of the Hague Convention provides that it "may" be recognized by third countries, if the formalities of the national law or laws of both parties are satisfied. A marriage celebrated in accordance with the religious ceremony prescribed by the personal law, but not in compliance with the civil formalities of the place of celebration, is regarded as valid in France, Germany, and the other countries following the optional rule.¹⁵¹

Except for this instance of reference to the personal law, the few countries which require their subjects to follow a religious ceremony even when marrying abroad find themselves isolated. Their requirements are observed neither by the countries of celebration nor by third countries. The difficulties involved are illustrated by such cases as the recent sequel to the famous *Papadopoulos* case, which revealed a first marriage in England and a second in Greece, the man being married to two women for ten years.¹⁵²

6. Other Tests

Foreign consular marriage: (a) *In general.* We have had occasion to deal with the position of the forum as concerns marriages at which a consular or diplomatic agent of a foreign power has officiated within the territory of the forum.¹⁵³ Con-

(June 17, 1927) *Revue* 1928, 332; *Trib. civ. Seine* (April 27, 1933) *Revue Crit.* 1935, 759.

Switzerland: NAG. art. 7f, whereby marriages celebrated abroad are valid if in accordance with the law of the place of celebration, is applied also to foreigners by STAUFFER, NAG. art. 7 no. 10, and others, but interpreted otherwise by BECK, NAG. 230 no. 48.

¹⁵¹ France: PILLET, 1 *Traité* 552 no. 259; BASDEVANT, *Revue* 1908, 284 (On occasion of an Austrian decision); AUDINET, 11 *Recueil* 1926 I 202ff., LEREBOURS-PIGEONNIÈRE 383 no. 325.

Germany: EG. art. 13 par. 1; art. 11 par. 1.

Belgium: App. Bruxelles (Dec. 15, 1913) *Revue* 1914, 611, approved by POULLET 472 no. 367.

¹⁵² *Papadopoulos v. Papadopoulos* (no. 2) (1935) [1936] P. 108; cf. *supra* n. 68 for the first *Papadopoulos* case [1930] P. 55.

¹⁵³ *Supra* pp. 220-222.

sent by the receiving country to such official action of a foreign representative is indicated either by liberal custom, as for instance, in France or Greece, or by an express clause of an international treaty. Now we are concerned with the status of a "consular" (or "diplomatic") marriage in the sending state.

Recently, the institution of consular marriage has been used primarily by Europeans and Americans marrying in Oriental countries, where marriage forms depend on the various religious denominations or national groups. Treaties allowing representatives of Western powers to exercise non-litigious jurisdiction have partly superseded the old system of capitulations. The recent increase in provisions concerning consular marriages, however, seems to indicate other needs. Switzerland, for instance, though generally prohibiting consular marriages, specially authorizes her representatives to officiate when located in remote countries or when Swiss nationals are unable to marry according to local formalities and the country of celebration is not likely to object.¹⁵⁴ Thus, relief might be given a Swiss couple who had obtained a divorce in Switzerland and wished to remarry each other in Spain, since Spain, ignoring the divorce, could make no technical ceremony of remarriage available to them, although a form of reconciliation is in such case provided.¹⁵⁵

A remarkable concession for the sake of international co-operation was made by the participant states in the Hague Convention on Marriage. By article 6, paragraph 1, second sentence, the signatory powers bound themselves not to oppose a diplomatic marriage, even though it would offend their own laws on remarriage or religious impediments. Thus, if

¹⁵⁴ Cf. Swiss Rev. Consular Regulation of Oct. 26, 1923, art. 63. This was, indeed, the situation in Peru for non-Catholics until the Law of Dec. 23, 1897. Cf. German RG. (June 9, 1883) 9 RGZ. 393 at 402.

And in Turkey for parties of different religions until the Civil Code of 1926; see SALEM, 7 Répert. 268 no. 220.

¹⁵⁵ BBL. 1919, IV. 310, no. 21.

both parties are aliens, the second marriage of a divorcé or even the marriage of an ordained Catholic priest is valid, although it would otherwise be considered repugnant to local policy.¹⁵⁶ In England, also, foreign marriages of aliens, celebrated before the consul of their common country, are regarded as valid, notwithstanding their invalidity according to the law of the place of celebration. This concession to the law of nationality is masked by the fiction that the parties have met on extraterritorial territory.¹⁵⁷

(b) *Authority granted by the sending state.* As a condition of consular marriage, the solemnizing official must be empowered by his own state to officiate at marriages in general or at specific marriages. Such authority is given either by law, as in Great Britain, France, and Italy,¹⁵⁸ or by administrative acts based on legislation, as in Germany.¹⁵⁹ A few states do not allow their agents any such function.¹⁶⁰ Consular officers of the United States are authorized to solemnize marriages if the parties are domiciliaries of the District of Columbia, a territory, Massachusetts, or Connecticut, or if they are United States citizens domiciled abroad.¹⁶¹ Other countries require either that both parties be their subjects¹⁶² or that at least

¹⁵⁶ WALKER 656, and others very inappropriately call this concession strange.

¹⁵⁷ See FOSTER, 65 *Receuil* 1938 III 444, no. 25.

¹⁵⁸ Great Britain: Foreign Marriage Act, 1892.

France: C. C. art. 48.

Italy: C. C. (1865) art. 368.

¹⁵⁹ Germany: Laws of May 4, 1870, § 1; Feb. 6, 1875, § 85; Law on Consular Jurisdiction of April 7, 1900, § 36 par. 2.

Switzerland: C. C. art. 41 par. 3; Rev. Consular Regulation (*supra* n. 154).

¹⁶⁰ Former Austria was in this group; see WALKER 647 (whose mention of Sweden and Portugal, however, is wrong).

Argentina seems disinclined to allow diplomatic marriages; see ZEBALLOS, *Bull. Argent. de Droit Int. Privé* 1905, 520. Likewise: Guatemala, *cf.* Trib. civ. Seine (March 15, 1932) *Revue Crit.* 1935, 436; El Salvador, *cf.* 15 *Bull. Inst. Int.* (1926) 160. On Colombia see RESTREPO HERNÁNDEZ 111, § 200 n. 1; on Peru, ROGER, 7 *Répert.* 30 no. 53.

¹⁶¹ Congressional Act of 1860, Rev. Stat. § 4082, 22 U. S. C. 72, Code of Fed. Regulations, Title 22 § 91.420; Mass. Gen. Laws (1932) II c. 207 § 43; Conn. Gen. Stat. (1930) c. 276, § 5150.

¹⁶² The Netherlands: Consular Law of July 25, 1871, as redrafted on July 15, 1887; Spain: C. C. art. 100 par. 3; Portugal: Law of Dec. 25, 1910, art. 58 § 2, etc.

one party belong to the sending state.¹⁶³ Still others permit consular marriage even of foreign couples; Great Britain does so when the country of celebration consents and both parties are nationals of the same country.¹⁶⁴

Illustration: France, not having authorized a celebration of marriage between a French party and a Bulgarian party before a French consul in Bulgaria, declares such marriage invalid in France; ¹⁶⁵ it is therefore invalid in Bulgaria too.

States should not be entirely free, however, and most states do not feel free, to fix the permissibility of consular marriages. In case both parties are not nationals of the sending state or, at least, where one party is a subject of the receiving state, the consent of the latter state should be required. A satisfactory rule has been laid down by the Hague Convention on Marriage, article 6 paragraph 1, first sentence:

"In respect of formalities the marriage is to be recognized everywhere, if it is concluded before a diplomatic or consular representative in conformance with the laws of his country, provided that neither of the spouses is a citizen of the state where the marriage is celebrated and that this state does not oppose the celebration."¹⁶⁶

Section 126 of the Restatement requires more simply that the marriage should be performed "in accordance with the

¹⁶³ France: C. C. art. 170 pars. 2 and 3, as completed by the Decree of March 8, 1937 (Clunet 1937, 649), listing remote non-Christian countries only; Germany: (*supra* n. 159) including denizens; Great Britain: Foreign Marriages Order in Council, 1913, arts 1, 2. Switzerland: Bundesrat requires as to marriages in China that the husband be a national, BECK, NAG. 223 no. 19. The Belgian law of July 12, 1931, art. 7 par. 2 permits by exception marriages between Belgian men and foreign women "in the countries where the local legislation prevents the celebration of marriages of the kind." Perhaps the idea is related to that prevailing in Switzerland (*supra* n. 154).

¹⁶⁴ See *Baillet v. Baillet* (1901) 17 T. L. R. 317.

¹⁶⁵ Cf. Trib. civ. Seine (May 7, 1937) with note in Clunet 1938, 522, 525; Trib. civ. Seine (March 15, 1932) *Revue Crit.* 1935, 436 (marriage celebrated before Guatemalan consul in Paris, who acted without authorization from his government, declared void).

¹⁶⁶ This provision is supplemented by arts. 6 and 7. Sweden: Law of 1904 with amendments, c.1 § 7 adopted the same solution. Great Britain and Belgium, *supra* n. 163; and Italy: Consular Law of Jan. 28, 1866, art. 29, take into consideration the consent of the receiving state.

law of the country where it takes place or with a treaty to which that country is a party.”

Unfortunately, many states are not so considerate.¹⁶⁷

A peculiar feature of a few laws is that a religious minister may be authorized to officiate.¹⁶⁸

The treaties are as varied as the statutes or customs of the sending states. Usually they require either that both parties belong to the sending state¹⁶⁹ or that one be a national or domiciliary of the sending state, the other belonging to a third state.¹⁷⁰

(c) *Law of third states.* Except for article 6, paragraph 1, of the Hague Convention, courts will, according to the principle of *lex loci celebrationis*, follow closely the position taken by the local law.¹⁷¹ In this regard, section 126 of the Restatement expresses a rule of universally settled law. But it must be borne in mind that most countries are satisfied when the marriage form agrees with their own municipal prescriptions. Hence, if both parties belong to the same state, it suffices to observe the regulations of this state and, if they are subjects of different states, to comply with the formalities of both states.

(d) *Ceremony.* Respecting details of the ceremony, the rules of the sending state are customarily followed in a

¹⁶⁷ Particularly Great Britain (*cf.* Hay v. Northcote, *supra* n. 77), although Foreign Marriage Act, 1892, s. 19, instructs the officer to refuse to perform the marriage if the celebration would be contrary to the rules of international private law or to the principles of international comity.

¹⁶⁸ Connecticut, Gen. Stat. (1930) c. 276 § 5150.

Sweden: Law of 1904 with subsequent amendments, c. 1, § 5 par. 2, § 8.

Norway: Law of June 26, 1925.

¹⁶⁹ See, for instance, the treaties of Germany with Italy (May 4, 1891), Soviet Union (Oct. 12, 1925), Panama (Nov. 21, 1927), Lithuania (Oct. 30, 1928), South Africa (Sept. 1, 1928), Bulgaria (June 4, 1929), Turkey (May 28, 1929), and Haiti (March 10, 1930), the treaties with Bulgaria (art. 19) and Turkey (art. 18) containing marriage regulations and the others conferring the right of the most favored nation.

¹⁷⁰ See for instance the three consular conventions between the three Baltic States of July 12, 1921 (11 League of Nations Treaties (1922) 87, 99; 25 *ibid.* (1924) 299) art. 15.

¹⁷¹ This is the widely prevailing opinion; *contra*: 2 ZITELMANN 613 and LEWALD in STRUPP, 1 Wörterbuch des Völkerrechts und der Diplomatie 264.

diplomatic marriage,¹⁷² although Soviet law does not respect this custom.¹⁷³

Marriage on the high seas. Insofar as the law of the place of celebration is competent, marriages on board ship on the high seas are governed by the law of the flag.¹⁷⁴ This rule seems to be universally accepted. Most domestic laws, however, are reluctant to authorize such marriages on their own vessels. Great Britain allows captains of vessels to officiate, provided the parties were unable to take advantage of a local law or consular intervention.¹⁷⁵ In the United States, it is generally held that the marriage is valid, if in conformance with the law of the shipowner's domicil.¹⁷⁶ To be sure, the law of the flag may permit marriage by mere consent.¹⁷⁷

Marriage in remote places. The validity of a marriage *per verba de praesenti* has been admitted where there was no means of solemnizing the marriage under some local law, e.g., in the Far East,¹⁷⁸ although there is less doubt about its validity if an ordained priest or minister is present.¹⁷⁹

Military marriages abroad. Soldiers serving abroad in time of peace or war, if allowed to marry at all, usually enjoy special privileges. There may be a special marriage officer, or soldiers may be allowed to marry by proxy or even by their own written declaration filed at the marriage office of the bride.¹⁸⁰

¹⁷² Código Bustamante art. 42.

¹⁷³ See MAKAROV, *Précis* 328.

¹⁷⁴ Restatement §§ 127 and 45.

¹⁷⁵ Foreign Marriage Act, 1892, § 12; and Foreign Marriages Order in Council, 1913, art. 20(2); *R. v. Anderson* (1868) L.R. 1 C.C.R.161.

¹⁷⁶ See GOODRICH 304.

¹⁷⁷ *Cf. Fisher v. Fisher* (1929) 250 N. Y. 313, 165 N. E. 460. See HACKWORTH, 2 *Digest of International Law* (1941) 371 § 165.

¹⁷⁸ See with respect to Japan: BATY, *op. cit. supra* n. 75 at 106-109.

¹⁷⁹ England: Lord Campbell in *R. v. Millis* (1843-1844) 10 Cl. & Fin. 534, 786; *Catterall v. Catterall* (1847) 1 Rob. Ecc.580. *Cf.*, on the ecclesiastical form, *Culling v. Culling*, Law Rep. [1896] P. 116.

Canada: *Re Sheran* (1899) 4 Terr. L. R. 83; *cf. Connolly v. Woolrich & Johnson* (1867) 11 L. C. J. 197, 1 R. L. (K. B.) 253 (involving the Indian marriage of a white man with an Indian woman). See also 1 JOHNSON 321..

¹⁸⁰ The method last mentioned was introduced by a recent German regulation of Nov. 4, 1939, RGBL.I 2163, §§ 13, 14: marriage in the absence of the husband, which consists of separate declarations of the parties without proxy.

In France it is provided that only French soldiers with brides of French nationality may appear before a civil officer of the army, while foreigners have to comply with the local formalities.¹⁸¹

IV. CONCLUSIONS

This subject has presented an excellent illustration of the thesis that a uniform conflicts rule is easily obtainable despite fundamental differences in municipal legal systems—provided that these differences do not prevent mutual tolerance. The only serious disturbance in this harmony is attributable to the attachment of a few countries to the traditional claims of certain religious denominations. In view of the general development in the last century and a half, such perseverance is hardly justifiable, although it reflects deserved gratitude for the civilizatory work of the churches during many centuries. Catholic countries such as Austria, Italy, Colombia, and Ecuador which at present have or had a short while since marriage rules largely accommodated to the conceptions of the Roman Church, nevertheless agree in the conviction that their nationals should not be prevented from using the marriage ceremonies that are legal in foreign countries. The Spanish Supreme Court criticized by the literature requires Spanish nationals to marry at the consulates, but not on the ground of religious law.

It may be hoped that the period of readjustment following the present war will stimulate reconsideration of these basic problems of international relations.

¹⁸¹ C. C. art. 93 par. 3, as amended by Law of Dec. 20, 1922. The British regulations do not apply to all parts of the army. E.g., the Foreign Marriages (China) Order in Council, 1938, excludes the solemnization by a marriage officer in China of marriages between parties either of whom is serving in China in His Majesty's Naval or Military Forces or the Royal Air Force.

CHAPTER 8

Substantive Requirements for Marriage

I. SURVEY

1. Terminology

IN THE traditional language of the canon law and most modern codifications, marriage requirements not concerned with formalities are labeled "impediments (obstacles) to marriage." According to their effect upon the validity of the marriage, they are divided into impediments merely capable of postponing its celebration—*impedimenta impedientia*, directory requirements—and those rendering the marriage void or voidable—*impedimenta dirimentia*, mandatory requirements. This division is well known in every law. (Cf. Restatement §§ 9, 122).

The term "requirements," which is frequently used today, is more convenient and more correct, because it includes the conditions of consent to marry, while "impediments" fails to include defects of consent.

"Capacity" to marry far from covers the whole concept. It denotes the general ability of a person to marry at all, for instance as defined by requirements of age and parental consent, but it does not refer clearly to an individual's being permitted to marry a specific person or a person of a determinate class. Nor does the term, capacity, include the requirement of sufficient consent of the parties; for this reason, in the text of the Hague Convention on Marriage, article 1, the words "The capacity to contract marriage" were replaced by "The right to contract marriage."¹ As short terms, however, both terms are and may be used.

¹ For this discussion see decision of the German RG. (Dec. 15, 1930) IPRspr. 1931, no. 58 at 119.

2. Two Rival Basic Principles

Not only are the municipal rules on intrinsic requirements of marriage extremely different, but also the rules relating to the conflict of municipal laws are confusingly varied. A few observations may help us to find our way.

There are two main principles, both coming from the statistes:

(a) One principle, represented in its purest form by the dominant conflicts law of the United States, points to the law of the place of celebration; a marriage good where contracted is good everywhere, and *vice versa*. The practice of applying this maxim,² which clearly originated in the ordinary contract theory,³ to the substantive requirements of a contract creating a status, was in defiance of the traditional doctrine of status. The reason for this custom is perhaps that the machinery of marriage licensing has seemed inadequate to meet the unknown laws of the respective domicils of the parties. And an avowed purpose of the principle has always been to make marriage possible for persons who could not marry under their domiciliary laws.

(b) In the European systems, the personal law of the parties controls the intrinsic requirements. Under this system the personal law may be determined either by the domicile or by the nationality of the parties, as the status rule may be.

Illustration: A sixteen-year-old girl of Serbo-Yugoslavian nationality is married in Michigan. She has capacity to marry under rule (a) and also according to English law based on domicile (under rule b) but is incapable according to her national law applied under rule b.

By certain regulations, however, both these points of contact, and sometimes even that of the place of celebration as a

² ULRICH HUBER, *De conflictu legum in diversis imperiis*, no. 8 (GUTHRIE, translation of SAVIGNY 512) "Si licitum est eo loco, ubi contractum et celebratum est, ubique validum erit effectumque habebit."

³ See JOHANN STEPHAN PÜTTER, 3 *Auserlesene Rechtsfälle*, part 1 (Göttingen, 1777) §§ 11-15.

third element, are combined with each other, with obscure complexities resulting from the combination. Other serious complications are bound to arise under this system when the personal laws of the parties are different.

3. Influence of Public Policy

Both basic principles have proved one-sided, each being closely limited by numerous exceptions. Whatever principle a country may have adopted, there will be a marked tendency not to apply a foreign marriage rule which conflicts with the matrimonial law of the forum. Marriage is one of the favorite objects of tenacious local custom and of more or less singular enactments. Once almost every town in Central Europe had its own law of marriage. Although centralizing states have always succeeded in unifying a multitude of matrimonial systems with almost no resistance except for the claims of churches, still each existing international private law is influenced (and if we except the United States, even greatly influenced) by the idea that its domestic rules alone are morally justified and form an indispensable gift to its own subjects. If we observe how varied marriage laws are and how antiquated or arbitrary many of them appear, we understand the reluctance of states to recognize each other's laws.

The matter is further complicated because more than one country may be involved, and in consequence different countries may apply their own public policies. There is the country where the parties intend to marry, the country which considers one or both of the spouses its subjects, the country where a lawsuit for annulment is brought, the country where recognition of the marriage or recognition or execution of an annulment is sought, and there may be other countries interested in the status of children.

The question of public policy depends on which of the two basic principles mentioned is adopted.

Under the main principle accepted in the United States, the substantive requirements for marriage are determined by the law of the state where the marriage is to be or has been celebrated. But apart from certain elementary exceptions, such as the rejection of polygamous and incestuous bonds, there has appeared a "substantial" and "growing" body of cases to protect the law of the domicil of the parties.⁴ Moreover, important legislative attempts have been initiated to curb "evasions" of the domiciliary policy of marriage.

In various other countries on the American continent, where the same basic principle prevails, the influence of the personal law has made itself felt even more pronouncedly.

Conversely, in a country allowing foreigners to marry only if the marriage is not prohibited by their domiciliary or national laws, additional requirements are established to satisfy local public policy (prohibitory public policy) and certain foreign prohibitions are disregarded as offending the local order (permissive public policy).

The phenomena mentioned above will be treated in the following pages. The situation arising when the validity of a marriage is examined in a lawsuit or when a foreign judgment on its validity or invalidity is presented for recognition, will be dealt with separately, since the problem is essentially the same for intrinsic and formal requirements.

4. Ecclesiastical Courts

A particular position is taken by ecclesiastical courts of all faiths. As the churches claim universal efficacy for their rulings, the tribunals constituted by them apply their own laws exclusively, irrespective of whether the marriage is celebrated in one country or another. Conflicts rules are lacking,

⁴ See Note, 26 Harv. L. Rev. (1913) 536 and GOODRICH 305; BEALE and others, "Marriage and the Domicil," 44 Harv. L. Rev. (1931) 501, 527, n. 85, notice "a growing consciousness of the power of the domicil."

and in some parts of the world the resultant confusions are considerable.⁵

II. LAW OF THE PLACE OF CELEBRATION

I. The Principle

The United States. In the United States,⁶ the law of the place of celebration has greater influence on the substantive requirements of marriage than in any other country. In this country, this law is applied by the marriage officials and judges of the state where the marriage is to be or has been celebrated, by the courts of the state or states where the parties had their domicils at the time of the marriage, and finally by the courts of any other state. In other words, from the standpoint of the domiciliary state or the standpoint of the state of celebration, the rule is the same for domestic and foreign marriages and for domiciliaries as well as for foreigners.

Argentina and others. The law of the place of celebration has also been adopted in a group of Latin-American countries but its application is greatly restricted, as each of these countries requires those persons whom it regards as its subjects (by domicil or nationality, respectively) when marrying abroad to observe all its prescriptions or a large number of them. This group includes Argentina,⁷ Guatemala,⁸ Paraguay, Peru, and Costa Rica.⁹ In this spirit the Treaty of Montevideo of 1889

⁵ On Bulgaria, cf. DANEFF, 38 Bull. Inst. Int. (1938) 5; on Palestine, GOADBY 143ff.

⁶ Restatement § 121. Cf. BISHOP, 1 New Commentaries on Marriage §§ 841ff.; 1 WHARTON § 165a; MINOR § 73; 2 BEALE §§ 121.2, 121.6, 121.7; KESSLER, 1 Z.ausl.PR. (1927) 858 n. 5.

⁷ Argentine Civil Marriage Law of 1888, art. 2, relating not merely to formalities as some writers have suggested; see ALCORTA, 2 Der. Int. Priv. 99; 2 VICO no. 13; ROMERO DEL PRADO, Der. Int. Priv. 277.

⁸ Guatemala: Law on Foreigners (1936) art. 36. See MATOS no. 228 at 342, 343.

⁹ Paraguay: Marriage Law (1898) art. 2;

Peru: C. C. Tít. Prel. art. V, par. 2;

Costa Rica: C. C. art. 9 (by implication).

(art. 11), recast in 1940 (art. 13 par. 1), formulates the principle as follows:

The capacity of persons to contract marriage, the form and the existence and the validity of the marriage act, are determined by the law of the place where it is celebrated.

The article enumerates a number of essential defects on account of which annulment may be sought, provisions with which we shall deal later. The main rule for substantive requirements seems, however, unqualified with respect to the marriage of two foreigners. In this case, the rule is applied regardless of whether the marriage takes place within or without the country. The same result was implicitly adopted by the Civil Code of Mexico for the Federal District ¹⁰ but has not been repeated in the Code of 1932.

Chile and others. In another group of Latin-American countries, a formula has been adopted similar to that of Chile, as follows:

Marriage celebrated in a foreign country in conformity with the laws thereof, or with the Chilean laws, shall have in Chile the same effects as if it had been celebrated on Chilean territory. (C.C. art. 119 par. 1.)

Apparently, an option is granted between local and national law with respect to formalities as well as other requirements. But the more recent Chilean Law on Civil Marriage, of January 10, 1884 (art. 15 par. 1), simply states:

Marriage celebrated in a foreign country in conformity with the laws thereof, shall have in Chile the same effects as if it had been celebrated on Chilean territory.

This text seems to indicate that requirements, both formal and substantive, are controlled by the local law alone, whereas Chilean subjects, according to an additional paragraph, must in addition obey the "prescriptions" or (in a more recent wording) the "prohibitions" of the Chilean marriage law.

¹⁰ C. C. (1884) art. 174; (1928) art. 161.

This group of countries,¹¹ therefore, seems to join the group discussed above.

Brazil's recent law (1942), going over to the domiciliary principle, contains two provisions:¹² In the case of any marriage celebrated in Brazil, Brazilian law is applicable to mandatory requirements (*impedimentos dirimentes*) and formalities. In case the parties have different domicils, the validity of the marriage is governed by the law of the first marital domicil. In the light of the foregoing parallels the language suggests that marriages celebrated in Brazil are exclusively governed by Brazilian law—correspondingly with the rule in this country—but that capacity to marry in foreign countries is determined according to the common domicil of the parties rather than to the place of celebration. The only available comment by a Brazilian author, however, transfers from the system of the Hague Convention to the new rules the consideration of the impediments established by the national laws.¹³

The obscurity of drafting in all these enactments is regrettable.

Denmark. In Denmark, likewise, the primary rule refers to the law of the place of celebration. This rule is not exclusive, however, since a marriage official may not preside at the marriage of two nonresident foreigners, if some impediment established by one of the domiciliary laws is proved to him.¹⁴ But where a person domiciled in Denmark enters upon a marriage in a foreign country, the Danish law does not claim any

¹¹ Ecuador: C. C. art. 115 par. 1 is similar to the older Chilean text; it is added, as it was formerly in the Argentine C. C. art. 164, that any annulment of a foreign marriage by an ecclesiastical authority must be respected.

Uruguay: C. C. (1868 as amended 1893 and 1914) art. 101, par. 1 and Act of May 22, 1885, are certainly to the same effect, as Uruguay is a participant in the Montevideo Treaty.

¹² Lei de Introdução (1942) art. 7 §§ 1 and 3.

¹³ ESPINOLA, 8-B Tratado 820 no. 203.

¹⁴ BORUM, Personalstatutet 424, 427, 440; see also HOECK, Personalstatut 16; BORUM and MEYER, 6 Répert. 218 nos. 34 and 37; MUNCH-PETERSEN, 4 Leske-Loewenfeld I 746. (These writers do not entirely agree with each other.)

influence, unless a strong public policy, such as that regarding bigamy or incest, requires attention.¹⁵

Código Bustamante. A singular application of the law of the place of celebration is made by article 48 of the *Código Bustamante*. While this code invokes as a general principle the personal law of the parties, article 48 provides that coercion, fear, and abduction as causes of nullity of marriage are governed by the law of the place of celebration.

Switzerland. Whereas the American rule, as conceived by the Restatement, refers exclusively to the municipal law of the place of celebration, in Switzerland a parallel rule is established¹⁶ for foreign marriages of Swiss nationals, with the distinct implication that above all the conflict law of the place of celebration shall decide what legal order applies to the case. This rule, which indicates an unusually broad-minded policy, has not always been correctly applied by non-Swiss courts. Taking into account the diversity of conflict laws, Swiss conflicts law gives way to any other conflicts rule of the foreign domicil. As a matter of fact, the draftsmen realized that in the statistical majority of cases the foreign conflicts rule would, on the basis of the nationality principle, refer the case to Swiss matrimonial law to govern the substantive requirements for Swiss nationals. The decision, however, is left to the local law, the intention being to rule out any conflict with the law applicable under the local conflicts rule. It follows that a marriage of Swiss nationals in the United States, if good at the place of celebration, is good under Swiss law too. It is immaterial whether the parties are domiciled at the foreign place of celebration.¹⁷

There is much doubt, however, whether this rule applies only where both parties are Swiss nationals or whether the local law governs mixed marriages as well. Sometimes the

¹⁵ BORUM, *Personalstatutet* 457; 6 *Répert.* 218 no. 37.

¹⁶ NAG, art. 7f.

¹⁷ BECK, NAG. 231 no. 50, *ibid.* 275 nos. 18-23.

courts have extended the rule to the latter case,¹⁸ but generally it is argued that only where both spouses are Swiss can the Swiss concession succeed in avoiding conflicts; where another legal order is involved, the nationality principle is preferred.¹⁹

Soviet Russia. Soviet Russia applies her marriage laws to all persons, including foreigners, who marry within the U.S.S.R.²⁰

2. Exceptions: Prohibitive Public Policy

The United States: Policy of the forum. Exceptions to the rule that a marriage validly contracted at the place of celebration is valid everywhere are made by common law practice as well as by statute.

A marriage is held invalid when it is, in the opinion of the forum, contrary to the general principles of Christendom. The only applications concern polygamous and incestuous marriages, and both are dealt with discriminately. Practical cases of polygamy are those of the so-called "progressive" sort, viz., where a party has gone through a second marriage after a divorce recognized at the place where granted but not recognized at the forum.²¹ Incest is not a characteristic of every marriage between near relatives prohibited at the forum; but such has been assumed in a few cases of marriage between nephew and aunt²² or even the widow of a nephew and an uncle.²³ The decisions respecting marriages of first cousins are in conflict.²⁴

¹⁸ BG. (Dec. 18, 1875) 1 BGE. 101; BG. (March 18, 1876) 2 BGE. 32; BG. (Oct. 28, 1881) 7 BGE. 658, 662.

¹⁹ BECK, NAG. 220 nos. 10 and 11; HUBER-MUTZNER 427 n. 171.

²⁰ See FREUND in 4 Leske-Loewenfeld I 366; MAKAROV, Précis 327.

²¹ Restatement § 132 comment a; 2 BEALE § 132.1.

²² Restatement § 132 comment b; Campbell v. Crampton (C.C.N.D.N.Y., 1880) 2 Fed. 417; State v. Brown (1890) 47 Ohio St. 102, 23 N. E. 747; Laughran v. Laughran (1934) 292 U. S. 216. England: (uncle and niece) De Wilton v. Montefiore [1900] 69 L. J. (Ch.) 717, [1900] 2 Ch. 481.

²³ Osoinach v. Watkins (1938) 235 Ala. 564, 180 So. 577.

²⁴ For validity: *In re Miller's Est.* (1927) 239 Mich. 455, 214 N. W. 428; Schofield v. Schofield (1912) 51 Pa. Super. Ct. 564. For voidness: Weinberg v. Weinberg (1927) 242 Ill. App. 414; Johnson v. Johnson (1910) 57 Wash. 89, 106 Pac. 500.

A further exception is made by common law on behalf of "a distinctive national policy of the forum." On this ground, miscegenation is considered a cause of invalidity in all Southern and some Northern and Western states.²⁵

Policy of domicile. Though the subject of endless controversy, a few other requirements established by the law of the domicile of a party have been enforced regardless of the local law; thus the provisions of Oklahoma and New York about nonage²⁶ and certain prohibitions against remarriage.²⁷ The Restatement does not hesitate to generalize in this respect; every time a state makes it clear that it regards a prohibition as arising out of a "strong public policy"—what in Europe is called extraterritorial or international public order—the prohibition limits the rule that the local law governs. If this extension of the force of the law of domicile were accepted unanimously, the situation would be somewhat clarified. Under no theory, however, would the law of the place of celebration be excluded in any jurisdiction by a domiciliary prohibition that, though of mandatory character or of public interest, is not held to be clearly of primary importance.²⁸

Under the common law, apart from the general function of public policy, the fact that the parties attempt to elude their domiciliary prohibitions is immaterial. The law of the place of celebration is applicable, as Judge McSherry stated in *Jack-*

²⁵ Restatement § 132 comment c; Dupré v. Boulard (1855) 10 La. Ann. 411; State v. Bell (1872) 7 Tenn. (Baxt.) 9, 32 Am. Rep. 549; Kinney v. Commonwealth (1878) 30 Va. (Grat.) 858, 32 Am. Rep. 690; Eggers v. Olson (1924) 104 Okla. 297, 231 Pac. 483. Cf. Jackson v. Jackson (1895) 82 Md. 17, 33 Atl. 317. Denying extraterritorial effect: The Inhabitants of Medway v. The Inhabitants of Needham (1819) 16 Mass. 157, 8 Am. Dec. 131.

²⁶ Ross v. Bryant (1923) 90 Okla. 300, 217 Pac. 364, criticized in 23 Col. L. Rev. (1923) 782; Cunningham v. Cunningham (1912) 206 N. Y. 341, 99 N. E. 845 (where, however, the parties had not cohabited). Contrary result in Massachusetts: Levy v. Downing (1913) 213 Mass. 334, 100 N. E. 638.

²⁷ Cf. Restatement §§ 130, 131; 2 BEALE § 130.1; STUMBERG 260.

²⁸ Cf. Restatement § 132 comment a; Sturgis v. Sturgis (1908) 51 Ore. 10, 93 Pac. 696, on marriage without parental consent. Fensterwald v. Burk (1916) 129 Md. 131, 98 Atl. 358, on the prohibition in Maryland of marriage between uncle and niece.

son v. Jackson, "even when they have left their own State to marry elsewhere for the purpose of avoiding the laws of the domicil."²⁹ Thus, infants domiciled in Wisconsin, marrying validly in Minnesota, are considered validly married in Iowa, although the marriage is invalid because of nonage in Wisconsin under its evasion clause.³⁰ In the same spirit, the Civil Code of Argentina, article 159, expressly establishes the law of the place of celebration as governing, "even where the marrying parties have left their domicil in order not to be subjected to the formalities and laws there in force."

By statute, however, specific provisions against evasion have now been introduced in seventeen states.³¹ Five of these states³² have adopted the Uniform Marriage Evasion Act of 1912, section 1 of which reads as follows:

"If any person residing and intending to continue to reside in this state who is disabled or prohibited from contracting marriage under the laws of this state shall go into another state or country and there contract marriage prohibited and declared void by the laws of this state, such marriage shall be null and void for all purposes in this state with the same effect as though such prohibited marriage had been entered into in this state."

This provision presupposes prohibitions rendering the marriage void under the home law; if it be understood as referring

²⁹ (1895) 82 Md. 17, 29; *cf. Fensterwald v. Burk* (1916) 129 Md. 131, cited above in note 28. *Danelli v. Danelli* (1868) 4 Ky. (Bush) 51 (widow and brother of late husband marrying in Switzerland contrary to their domiciliary Austrian law); *Stevenson v. Gray* (1856) 17 Ky. (B. Mon.) 193, and *BISHOP*, 1 New Commentaries on Marriage § 843. A similar statement in *McDonald v. McDonald* (1936) 6 Cal. (2d) 457, 58 Pac. (2d) 163, that the intention of the parties to evade a requirement is entirely immaterial, has shocked *BATIFFOL*, the distinguished French writer, in spite of his familiarity with American conflicts law; see his spirited comment on this case in 32 *Revue Crit.* 1937, 160, 167ff. French law especially is accustomed to repression of *fraude à la loi*.

³⁰ *Boehm v. Rohlf*s (1937) 224 Iowa 226, 231, 276 N. W. 105, 108.

³¹ *HARPER* and *TAINTOR*, Cases 713, distinguish the statutes enacting a subjective test of evasion, those enacting an objective test of evasion, including the Uniform Marriage Evasion Act, and those covering all ceremonies between persons who intend to live in the state.

³² Illinois, Louisiana, Massachusetts, Vermont, and Wisconsin.

solely to voidness *ab initio*, the provision may be criticized as ineffectual.³³ At least it is not confined to single enumerated prohibitions as are some other evasion statutes;³⁴ hence, it would not be impossible to bring child marriages under its protection, though no such decision is known.³⁵ Nor does the Uniform Act require, as three states' enactments do,³⁶ that the parties intend to evade a prohibition.

The Uniform Act has extended its scope remarkably by adding section 2, whereby an evasive marriage is prohibited by the state of celebration itself. Further repression of evasive marriages can obviously be accomplished by reciprocation among the states sharing the policy of preventing evasion; in fact, the Supreme Court of Wisconsin has declared void a marriage celebrated in Indiana in defiance of the marriage prohibition and the evasion statute of Illinois, the parties being domiciled in Illinois. And other cases seem to promote this approach,³⁷ which has been properly construed as a *renvoi* to the conflicts rule of the domicil.³⁸

³³ RICHMOND and HALL, *Marriage and the State* (1929) 196. As a matter of fact, it seems that not every mandatory requirement is given extraterritorial effect even in interpreting the Uniform Marriage Evasion Act; see *Lyannes v. Lyannes* (1920) 171 Wis. 381, 177 N. W. 683; cf. *KESSLER*, 1 *Zausl.P.R.* (1927) 858, 861.

³⁴ E.g., miscegenation (Montana), capacity (Connecticut), blood relationship (West Virginia).

³⁵ Recently all jurisdictions have established statutory rules on age. Evasion of such provisions was one of the principal purposes of marriage out of the state; cf. the enumeration of motives for such marriages by *GOODRICH* 306. There are still marked variances among the statutes.

³⁶ *Indiana Stat. Ann.* (Burns, 1933) § 44-209.

Maine Rev. Stat. (1930) c. 72 § 9 (intention of returning).

West Va. Code Ann. (Michie, 1937) c. 48 § 4695 [17].

³⁷ *Hall v. Industrial Commission* (1917) 165 Wis. 364, 162 N. W. 312; note that Wisconsin has adopted the same Uniform Act as Illinois. In *L. Meisenhelder v. Chicago and Northwestern Railway Company* (1927) 170 Minn. 317, 213 N. W. 32, a Kentucky marriage between first cousins, valid where celebrated, invalid at the domicil in Illinois under the evasion statute in force there, was held invalid in Minnesota. See also *People v. Steere* (1915) 184 Mich. 556, 151 N. W. 617, criticized in 13 Mich. L. Rev. (1915) 592, but cf. *GOODRICH* 313 n. 54. See for comment *TAINTOR*, "Effects of Extra-State Marriage Ceremonies," 10 *Miss. L. J.* (1938) 105.

³⁸ *GRISWOLD*, "Renvoi Revisited," 51 *Harv. L. Rev.* (1938) 1165 at 1199ff.

Under common law principles also, bigamy, incest, and miscegenation, when subject to a "strong" domiciliary policy, are sufficient cause for annulment in the courts of any third state having the same distinctive public policy. The Restatement again achieves a broad generalization. According to section 132, wherever a statute at the domicile makes a marriage void even though celebrated in another state, the marriage is void—not only at the domicile but also in all third states and even in the state of celebration, for section 132 says "everywhere."³⁹

The Uniform Marriage Evasion Act, section 3, provides the following additional precaution: the licensing official must ascertain that a party residing in another state is not prohibited from marrying by the laws of the jurisdiction where he resides.⁴⁰ Yet no independent verification of the allegations of candidates is usual.⁴¹

The Uniform Marriage Evasion Act, section 1, prohibiting the parties from going "into another state or country," was probably intended to be applicable in any country as part of a domiciliary law. Under this assumption, the marriage, celebrated in Florida, of an American or an Englishman domiciled in Illinois with his first cousin, is invalid under the laws not only of Illinois but also of France, where the principle of nationality requires the application of the law indicated by the national law of the person.⁴²

It may be noted that, except for miscegenation, the notion of evasion apparently is not extended to the case of parties effectively changing their domicile, i.e., abandoning their old

³⁹ It has been repeatedly stated that no support can be found in the cases for this view, cf. e.g., VARTANIAN, *Foreign Marriages—Recognition*, 117 A. L. R. (1938) 186, 188.

⁴⁰ Improved in Wyoming Comp. Stat. (1920) § 4960, amended by L. 1931, c. 99 § 1; Rev. Stat. Ann. 1931, ch. 68 art. 106 (68-106).

⁴¹ RICHMOND and HALL, *Marriage and the State* (1929) 197, regretting this and other deficiencies, advocate an efficient verification of assertions, state supervision, and interstate exchange of records.

⁴² Cf. KESSLER, 1 *Zausl.PR.* (1927) 858, 863.

place of residence and establishing themselves for the time being at the foreign place where they have their wedding. If, for instance, the parties are forbidden at their domicile to marry within a certain time under the sanction of nullity, they may transfer their domicile to another state and validly marry under its law.⁴³ The marriage will be recognized even in the former jurisdiction.⁴⁴

Denmark. A foreign marriage of Danish domiciliaries is annulled when it contravenes the prohibitions against bigamous or incestuous marriages.⁴⁵ Moreover, in case both parties were domiciled in Denmark, the marriage may be annulled by royal decree.⁴⁶

Latin-American countries. Restrictions of much greater significance are imposed on the principle *lex loci celebrationis* in the Latin-American countries mentioned above (p. 247). In some of these countries, the entire body of domestic prohibitions is declared compulsory on subjects marrying abroad.⁴⁷ In others, a broad catalogue of requirements is similarly prescribed.⁴⁸ The Treaty of Montevideo of 1889, article 11, recast in 1940, article 13, had the task of limiting the influence of public policy in the mutual relations of the participant states. This convention, however, still reserved to every state the right to consider void a marriage valid where celebrated, in the event of any of the following defects:

- (a) Defect of age in one of the parties, the minimum required being fourteen years completed by the man and twelve by the woman;

⁴³ *Fitzgerald v. Fitzgerald* (1933) 210 Wis. 543, 246 N. W. 680.

⁴⁴ *State v. Fenn* (1907) 47 Wash. 561, 92 Pac. 417; *Pierce v. Pierce* (1910) 58 Wash. 622, 109 Pac. 45; GOODRICH 307 n. 29.

⁴⁵ See BORUM, *Personalstatutet* 451 and 6 Répert. 218 no. 37.

⁴⁶ Denmark: Crim. Code of Feb. 10, 1866, § 4; cf. HOECK, *Personalstatut* 24.

⁴⁷ Chile: C. C. art. 119 par. 2.

Costa Rica: C. C. art. 9.

Ecuador: C. C. art. 115 par. 2.

⁴⁸ Argentina: Civil Marriage Law (1888) art. 2.

Mexico: C. C. (1884) art. 175. Cf. ROMERO DEL PRADO, *Der. Int. Priv.* 280.

- (b) Relationship between the spouses in direct line by blood or affinity, either legitimate or illegitimate;
- (c) Relationship between the spouses of legitimate or illegitimate brother and sister;
- (d) Having caused the death of one of the spouses of a former marriage as perpetrator or accomplice in order to marry the surviving spouse; ⁴⁹
- (e) A former marriage not legally dissolved.

Analogous reservations as made by some states, e.g., Argentina (C.C. art. 159), are evidently meant to apply only to their own subjects. The reservations contained in the Convention of Montevideo, on the contrary, seem to be standard requirements, common to all participant states, which may be raised by any participant state in any case of a foreign marriage. If this assumption is correct, the influence of public policy has been correspondingly unified to a considerable extent.

In Ecuador (C.C. art. 115 par. 1), a foreign marriage of any person that is valid at the place of celebration is recognized, although, however, invalidation by an ecclesiastical court must be respected.⁵⁰

Switzerland. Swiss law is applicable in cases of evasion, where the parties marry in a foreign place with evident intention to evade the grounds of nullity of Swiss law.⁵¹ The three premises for this rule are that only an artificial contact with the foreign place of celebration existed, that mandatory requirements have been evaded, and that both parties knew the facts and manifestly intended to evade the Swiss prohibitions. All these three conditions are seldom proved in a single case.⁵²

⁴⁹ The case of a married person causing the death of his or her own spouse, must obviously be included.

⁵⁰ No analogous consequence of the state's connection with the Catholic church exists in Italy or Spain.

⁵¹ NAG, art. 7f par. 1.

⁵² In the practice of the Federal Tribunal there is just one decision, BG. (Jan. 19, 1934) 60 BGE. II 1, Clunet 1938, 984, where a lunatic and his bride

A tacit fourth condition for the application of this rule seems to be Swiss nationality or at least Swiss domicile of both parties; ⁵³ if the parties have in fact, and not merely fictitiously transferred their domicile from Switzerland to a foreign place, the provision is inoperative, just as the American evasion rules.

Apart from the rule just mentioned on evasion, which may or may not be included in the idea of international public policy, Swiss courts reserve to themselves the discretionary power to consider a marriage void on grounds of public policy. The Federal Tribunal, emphasizing the necessity of such stringent national policy, has recently denied recognition to a foreign remarriage of a Swiss citizen who was still married under Swiss law.⁵⁴ However, not all grounds for invalidity, opposed to the marriage of foreigners in Switzerland, are applicable to the foreign marriage of a Swiss subject.⁵⁵ Particularly, the provisions preventing marriage between uncle and niece and aunt and nephew do not have the effect of invalidating a marriage celebrated abroad, although in such cases Swiss certificates that the candidates are capable of intermarrying are not issued.⁵⁶

3. Exceptions: Permissive Public Policy

The United States. In the United States, it is a fairly well settled policy that foreign penal restrictions upon freedom are not recognized. This principle applies to penal legislative prohibitions on remarriage; extraterritorial effect is denied to

traveled to Brighton, England, to marry there, and NAG. art. 7f. was invoked *ad abundantiam*.

⁵³ Cf. SCHNITZER 159, and BECK, NAG. 241 no. 88, having different opinions. BECK, NAG. 241 no. 85, and others suggest that the husband must be a Swiss citizen; I have disregarded this arbitrary opinion.

⁵⁴ BG. (May 13, 1938) 64 BGE. II 74.

⁵⁵ BECK, NAG. 232 no. 56 and *ibid.* 262 no. 154.

⁵⁶ BECK, NAG. 232 no. 57.

such prohibitions everywhere, even when they are established by the domiciliary state.⁵⁷ Disregard of racial prohibitions⁵⁸ falls in the same category.

Switzerland. Swiss law has established the following important general limitations on recognition of foreign marriage prohibitions:

A marriage contracted abroad, which is invalid according to the law of the place of its celebration, may be declared invalid in Switzerland only if it also is invalid under Swiss law.⁵⁹

The idea is that the domestic legal order is not interested in annulling a marriage that satisfies Swiss requirements. It is doubtful, however, to what group of persons this provision is intended to apply.⁶⁰

III. PERSONAL LAW

1. The Primary Principle

Law of the domicile. The law of the domicile of either party governs marriage requirements in Great Britain, according to prevailing opinion, and in the British Empire, Norway, and, as has been mentioned, to some extent in Denmark.⁶¹ The Scandinavian Convention on Family Law also has established this as a primary rule.

The position of British law, it is true, is not quite clear. English courts are accustomed to think in terms of jurisdiction rather than to distinguish competency of tribunal and applicable law. They are supposed to recognize, however, foreign judgments affecting the status of Englishmen domiciled

⁵⁷ *Commonwealth v. Lane* (1873) 113 Mass. 458; *Van Voorhis v. Brintnall* (1881) 86 N. Y. 18; *State v. Shattuck* (1897) 69 Vt. 403, 38 Atl. 81.

For further details see STUMBERG 260.

⁵⁸ *State v. Tutty* (C. C. S. D. Ga., 1890) 41 Fed. 753.

⁵⁹ NAG. art. 7f par. 2.

⁶⁰ See discussion by BECK, NAG. 258 no. 143, and SCHNITZER 160.

⁶¹ Cf. *supra* p. 249; for Denmark, *supra* p. 256, ns. 45, 46.

within the jurisdiction of the foreign court. Nevertheless, in *Wilton v. Montefiore* (1900),⁶² a marriage between a Jewish maternal uncle and his niece domiciled in England was declared void, although it was alleged to be valid by both Jewish custom and the law of the place of celebration. In *Sottomayor v. De Barros* (1877),⁶³ it was held that a marriage of first cousins domiciled in Portugal, prohibited from marrying there, is to be deemed invalid also in the eyes of an English court; a contrary result was reached in the second case of *Sottomayor v. De Barros* in 1879,⁶⁴ solely because it had then been established that the bridegroom had his domicile in England when the parties married in England.

On the basis of this latter case, many writers have believed that English courts would always apply domestic law, if the marriage is celebrated in England and one party, or at least the bridegroom, is domiciled there, irrespective of any incapacity by which the other party may have been affected under his own domiciliary law.⁶⁵ Thus, whereas a domiciled Englishman marrying abroad would remain subject to the English rules on capacity, the foreign grounds of incapacity of a person domiciled abroad would be disregarded. This alleged rule has acquired world-wide notoriety; it has been labelled a badge of "insular pride and complacency."⁶⁶ In fact, apart from the unclear grounds of the court in the second *Sottomayor* decision and the entirely discredited case of *Ogden v. Ogden*,⁶⁷ there is no reasonable support for such a unilateral English

⁶² [1900] 2 Ch. D. 481.

⁶³ [1877] 3 P. D. 1.

⁶⁴ [1879] 5 P. D. 94.

⁶⁵ WESTLAKE §§ 21, 25; DICEY, Rule 183 Exc. 1; 6 HALSBURY 376; less decidedly, FOOTE 125.

⁶⁶ CHESHIRE 228; FOSTER, "Some Defects in the English Rules of Conflict of Laws," 16 Brit. Year Book Int. Law (1935) 84, 88. See e.g., BATY, "Capacity and Form of Marriage," 26 Yale L. J. (1917) 444; GOODRICH 316 n. 66; and more recently GRAVESON, "Matrimonial Domicil and the Contract of Marriage," 20 Jour. Comp. Leg. (1938) 55, 65; 3 FRANKENSTEIN 60 n. 17.

⁶⁷ [1908] P. 46; cf. *infra* p. 267 and n. 95.

doctrine.⁶⁸ That the place of celebration has no importance⁶⁹ was expressly stated in the second *Sottomayor* case.

Cheshire criticizes the rule from another point of view, suggesting that only the "matrimonial domicile" should be decisive. We shall discuss the merits of this doctrine shortly. At any rate, Cheshire himself believes that only the second *Sottomayor* case is in his favor; he admits that Sir James Han-
 nen did not base his decision upon the fact that England was the matrimonial home and, further, that the grounds of decision are unsatisfactory.⁷⁰ In any event, a recent English decision,⁷¹ overlooking Cheshire's opinion, adopts with better foundation the prevailing doctrine that the domicile of either party determines the capacity to marry.

National law. In the rest of the world,⁷² the national law of either party governs intrinsic marriage requirements. The Hague Convention on Marriage of 1902, article 1, and the

⁶⁸ In *Chetti v. Chetti* [1909] P. 67 the prohibition against intermarriage between a Hindu Brahman and a foreigner was disregarded, but this disability was one that the person affected could discard at will (CHESHIRE 228 n. 1). Moreover, it was considered inappropriate to assert such a prohibition against an English marriage to an English partner, obviously because repugnant to public policy to do so.

⁶⁹ However, BECKETT, "The Question of Classification ('qualification') in Private International Law," 15 *Brit. Year Book Int. Law* (1934) 46 advocates the American principle.

⁷⁰ CHESHIRE 226; *contra*, see GRAVESON, 20 *Journ. Comp. Leg.* (1938) 55, cited *supra* n. 66.

⁷¹ *In re Paine*, *In re Williams*, *Griffith v. Waterhouse* [1940] 1 Ch. D. 46, [1939] 108 L. J. (Ch.) 427 per Bennett J., *cf.* Note, 56 *Law Q. Rev.* (1940) 22. BENTWICH, "Recent English Cases on Domicile in Matters of Personal Status," 52 *Juridical Review* (1940) 284, 288 (English prohibition applied to marriage in Germany of a man domiciled in Germany and his late first wife's sister, previously domiciled in England).

⁷² Austria: OGH. (1907) 44 GLU.NF. no. 3811; WALKER 597, 598.

Belgium: C. C. art. 170 *ter*, as established by Law of July 12, 1931, art. 14.
 Bulgaria: see 1 BERGMANN 65.

Finland: Law of Dec. 5, 1929 on Family Relations of International Nature, sec. 1 (Finns abroad); sec. 2 par. 1 (foreigners in Finland).

France: C. C. arts. 3 and 170.

Germany: EG. art. 13 par. 1.

Greece: C. C. (1856) art. 4 par. 3; C. C. (1940) art. 13.

Haiti: C. C. art. 155 (Haitiens abroad).

Honduras: C. C. arts. 137-139.

Código Bustamante, article 36 (for states following the nationality principle), adopted this rule, while the Scandinavian Convention on Family Law acknowledges it as a subsidiary rule.

If, within a state, religious law determines the personal law, the substantive requirements of marriage are usually included.⁷³

Renvoi. In the conflict of domicil and nationality principles or of either of them with the law of the place of celebration, renvoi is accepted in most European countries.⁷⁴

Illustrations: (i) Two Swiss parties domiciled in Switzerland married in Brighton, England. Swiss law (NAG. art. 7f) refers the validity of the marriage to the English conflicts law,

Hungary: Marriage Law of 1894, §§ 108, 109, 110; *cf.* Clunet 1924, 597; 6 Répert. 463 nos. 83 and 88.

Italy: C. C. (1865) art. 100 par. 1; C. C. (1942) art. 115 (Italians abroad); art. 116 (foreigners in Italy).

Luxemburg: C. C. art. 3 par. 3 and art. 170.

Monaco: C. C. art. 3 par. 3 and art. 138.

The Netherlands: BW. art. 138; H. R. (Jan. 6, 1911) W. 9125.

Nicaragua: C. C. arts. 102 and 103.

Poland: Law of 1926 on private international law, art. 12 par. 1.

Portugal: Code of Civil Register of February 18, 1911, arts. 40 and 245; Regul. Consular, D. no. 6462 of March 7, 1920, arts. 143, 144; see CUNHA GONÇALVES, 1 *Direito Civil* 678.

Spain: C. C. art. 9; Trib. Supr. (July 10, 1916) 137 Sent. 105 (Spaniards abroad). Spanish Morocco, Dahir de la condición civil de los españoles y extranjeros, art. 10.

Sweden: Law of July 8, 1904 with amendments, c. 1 §§ 1, 2.

Switzerland: NAG. art. 7c (for marriage within the state).

Turkey: 7 Répert. 264 no. 209.

China: Law of 1918, art. 9.

Japan: Law of 1898, art. 13.

⁷³ The rule that religious law governs the requirements for marriage is in accordance not only with Catholic canon and Greek Orthodox law but also "with Ottoman and Oriental tradition" in Palestine, as GOADBY, 152, declares; he cites, *id.*, n. 8, *Re Alison's Trusts* (1874) 31 L. T. 638 (marriage in Persia of an Armenian Christian woman held invalid under Armenian canon law) and *Moharem Benachi c. Salomon Sasson*, *infra* p. 272, n. 118.

⁷⁴ France: Cour Paris (March 23, 1888) Clunet 1889, 638; *cf.* WEISS, 3 *Traité* 478 n. 2.

Germany: EG. art. 27; RG. (Feb. 15, 1912) 78 RGZ. 234, for further renvoi; Bay. OLG. (Jan. 18, 1918) JW. 1918, 375; KG. (March 22, 1906) 32 *Jahrb. FG. A* 28. On certain controversies see RAAPE 260.

Switzerland: NAG. art. 7f, based on art. 54 of the Swiss Constitution.

which, in turn, refers the question to the Swiss domestic law. Hence, Swiss law was applied by the Swiss Federal Tribunal.⁷⁵

(ii) An American citizen domiciled in Germany married a German woman, apparently in Germany. The German court applied German law to the requirements for both parties, on the erroneous basis that the American law referred the man's capacity to marry to the law of his domicile; but the court could have reached the same result through the application of the American principle of *lex loci celebrationis*.⁷⁶

Contrary to its general attitude, the Hague Convention of 1902, article 1, in deference to the aforementioned Swiss rule, allowed an "express" reference of the national law to another law, thus affirming the Swiss rule while condemning renvoi in general.

2. Problems Arising when Parties are Subject to Different Personal Laws

Each law applied separately. The general doctrine is that each party must be free from prohibitions to marry the other party, this to be decided, in a country following the domiciliary principle, separately according to the law of the domicile of each party and, in a country following the nationality principle, separately according to the national law of each party. It must be noted, however, that this doctrine has had and still has opponents.

Minority opinions. Savigny,⁷⁷ at the time when the domiciliary principle was unchallenged, pleaded for the law of the first matrimonial domicile, which he identified with the domicile of the future husband, unless the parties had in fact established their domicile at another place or intended to do so. Savigny was followed by many writers of the early and later nineteenth

⁷⁵ BG. (Jan. 18, 1934) 60 BGE. II 1.

⁷⁶ OLG. Dresden (Jan. 15, 1912) 26 ROLG. 211.

⁷⁷ SAVIGNY § 379, tr. by GUTHRIE 291.

century,⁷⁸ but his view has finally been abandoned, since long ago objections were made that it is unfair and antiquated to disregard the personal law of the bride.⁷⁹ It is also frequently urged that the validity of the marriage cannot be tested by the law of the place where the parties establish their domicile after their marriage. Nevertheless, Cheshire explicitly invokes Savigny's theory for his resurrection of the same opinion.⁸⁰

The Marriage Act of Hungary provides that in any case where a Hungarian man marries a foreign woman, either at home or abroad, her personal law is to be considered only with respect to her age and capacity to consent, while in all other respects the validity of the marriage is to be tested exclusively by Hungarian law.⁸¹ The Civil Code of Honduras even makes Honduran law obligatory on the capacity of both parties to marry abroad, when one party is a citizen.⁸² By such laws, the influence of domestic public policy, described below, is certainly exaggerated.

Another opinion, now discredited, urged the application of the more severe of the two laws involved.⁸³ At present, the only doctrine of importance is the general doctrine first stated.

Doctrine of unilateral prohibitions. To apply to either party his or her personal law has proved delicate. Following the canon law and Savigny,⁸⁴ a distinction has been drawn between

⁷⁸ ROTH, 1 System 288; GIERKE, 1 Deutsches Privatrecht 236 — these two fascinated by old German law; WINDSCHEID, 1 Pandekten (ed. 9) § 35 no. 4. The rule was partly accepted by 1 BAR § 160 and is now advocated by BARTIN, 2 Principes 123.

⁷⁹ WALKER 569.

⁸⁰ CHESHIRE 220, 221. Cf. also GRAVESON, 20 Journ. Comp. Leg. (1938) 55, 68, *supra* n. 66. *Contra*: GOODRICH 314.

⁸¹ Marriage Law of 1894, §§ 110, 111.

⁸² Art. 138.

⁸³ ARMINJON, 2 Précis 457 no. 214. Occasionally certain impediments usually considered involving only one spouse, are given a broader interpretation affecting both spouses, see e.g. 2 ZITELMANN 609 n. 300 and KG. (Dec. 21, 1936) JW. 1937, 2039 and see *contra* RAAPE, 2 D.IPR. 144 n. 3.

⁸⁴ SAVIGNY § 379, tr. by W. GUTHRIE 291; "Denkschrift," 14 Z.int.R. (1904) 524, 525. KURT STEINLE, Die zweiseitigen Ehehindernisse im internationalen Privatrecht, Thesis (Munich, 1939).

unilateral and bilateral prohibitions, although no settled definition of these terms exists nor even seems necessary. Roughly speaking, some provisions of matrimonial law concern only one person, while others apply to both parties or generally to the conclusion of the marriage. In the first case, one of the parties lacks capacity, and this party alone is prohibited from marrying (unilateral); in the second case, the prohibition resulting from the disqualification of one of the parties includes both.

In consonance with the personal law, each requirement must be observed just as it would have to be observed in the homeland. Illustration is provided by the following four important unilateral prohibitions (a-d). A fifth example (e) leads to the related question of the party who may bring suit for annulment, the determination of which also depends on the personal law.⁸⁵

(a) *Age required for marriage.*⁸⁶ In all countries following the system of nationality, an Italian girl may marry on attaining fourteen years of age, a German at sixteen, a Serbian at seventeen, and a Greek, Spanish, or Northern Irish girl at twelve. It is immaterial what the law of the other party prescribes.

(b) *Consent in form but not in fact; defective intention.* Defects affecting consent to marriage, such as consent induced by error, fraud, or duress, are exclusively determined by the law of the spouse whose intention is alleged to be vitiated. The law of the partner is immaterial.⁸⁷

⁸⁵ For other cases in French practice, see J. DONNEDIEU DE VABRES 439ff.

⁸⁶ Germany: RG. (Dec. 21, 1916) JW. 1917, 364.

⁸⁷ France: Cases of mistake: Trib. civ. Strassbourg (Dec. 21, 1920) Clunet 1921, 933; App. Dijon (March 20, 1922) Clunet 1922, 409; Trib. civ. Seine (June 11, 1929) Revue 1930, 458. For duress see AUDINET, "Les Conflits de lois en matière de mariage et de divorce," 11 Recueil 1926 I 175 at 180.

Germany: RG. (May 3, 1917) Warn. Jahrbuch 1917, no. 210; RG. (Oct. 6, 1927) Revue 1930, 129; RG. (June 23, 1930) IPRspr. 1930, n. 65; RG. (Feb. 16, 1931) JW. 1931, 1340, and many decisions of lower courts collected by 3 FRANKENSTEIN 82 n. 86. In the case RG. (Feb. 6, 1930) JW. 1930, 1003,

Illustration: A Belgian man married a German woman. He was mistaken as to her virginity. The man is not allowed to avail himself of the German provision that a marriage may be attacked upon the ground of error concerning the personal characteristics of the other spouse, but is limited to the Belgian provision which regards only an error in physical identity of the other spouse as relevant.⁸⁸

(c) *Consent of parents or guardians.* The consent of parents or guardians required for a marriage of parties who have not reached a certain age, such as twenty-one,⁸⁹ and, according to some laws, the duty of the child to notify his parents of his intended marriage ("acts of respect"),⁹⁰ all come under the general rule regarding the capacity of the child or ward to marry. This is one of the requirements called, according to the French doctrine, "*formes habilitantes*," understood in France to have nothing to do with formalities. These requirements are governed by the same law that is competent to declare a party incapable of marrying by his own will alone. Continental opinion has it that these requirements are ruled by the national law and not by the law of the place of celebration.⁹¹ For

IPRspr. 1930, no. 64, the error of a Swiss husband was decided under the Swiss Civil Code instead of the Swiss conflicts rule (NAG. art. 7f), calling for the application of the German Civil Code; cf. 3 FRANKENSTEIN 59 n. 13.

Italy: Cass. Torino (July 31, 1883) Giur. Ital. 1883, I 617, Sirey 1886.4.1

Switzerland: OG. Bern (Oct. 27, 1927) 64 ZBJV. (1927) 185.

⁸⁸ German Marriage Law of 1938, § 37 (even broader than BGB. § 1333); Belgian C. C. art. 180; cf. Cass. Belg. (July 17, 1925) Pasicrisie 1925.1.370, emphasizing that not even "*dol*," fraudulent misrepresentation, justifies an action for avoiding the marriage, the same as in France, see Chambres Réunies (April 24, 1862) D.1862.1.153.

⁸⁹ E.g., France: C. C. arts. 148, 158, 159; Germany: BGB. §§ 1303-1308, Marriage Law of 1938, §§ 3ff.; Quebec: C. C. art. 119.

⁹⁰ France: C. C. art. 151.

Belgium and Luxemburg: C. C. art. 151.

Spain: C. C. art. 47.

The Netherlands: BW. art. 99.

⁹¹ Belgium: Trib. civ. Bruxelles (Jan. 3, 1913) Clunet 1914, 633.

France: Trib. civ. Seine (Aug. 4, 1880) Clunet 1880, 478; Trib. civ. Seine (Dec. 21, 1885) Clunet 1886, 448; Trib. civ. Seine (July 28, 1905) Clunet 1906, 1152; Trib. civ. Seine (June 15, 1910) Clunet 1911, 212; Trib. civ. Seine (Jan. 10, 1917) Clunet 1918, 1192; Trib. civ. Seine (March 8, 1920) Clunet 1920, 206; Trib. civ. Seine (Nov. 17, 1926) Clunet 1928, 404. Similarly, on consent of council of family and tutor *ad hoc* for a natural child, Trib.

example, the opposition of an American father to the marriage of his daughter, likewise an American national, has been rejected because of her national law.⁹²

This conception also seemed accepted for a time in England. English courts applied in accordance with their meaning foreign statutes requiring the consent of parents or similar acts, that is, the statutes were construed as in the countries of their enactment, either as postponing the marriage or as threatening its validity.⁹³ At present, however, such permission is ordinarily regarded in England as a formal requirement and governed, for this reason, by the law of the place where the marriage is celebrated.⁹⁴ It is again primarily the decision of *Ogden v. Ogden* which led to this change, a "very much discredited" authority indeed.⁹⁵ A better rule would perhaps have

supérieur Papeete (June 28, 1909) Clunet 1910, 167; ratification of marriage by parents, Cour Paris (May 15, 1917) Clunet 1917, 1413; Trib. civ. Seine (Jan. 18, 1923) Clunet 1924, 117.

Germany: RG. (Dec. 21, 1916) JW. 1917, 364; somewhat confused KG. (March 22, 1906) 32 Jahrb. F.G. A 28.

Greece: Law of May 28-29, 1887, see 2 STREIT-VALLINDAS 291 n. 27.

Quebec: Agnew v. Gober (1907) 32 Que. S. C. 266, (1919) 38 Que. S. C. 313 (judgment revised); cf. 1 JOHNSON 283, 287.

⁹² Trib. civ. Seine (Jan. 30, 1923) Revue 1922-1923, 494.

⁹³ Postponing impediments: Simonin v. Mallac (1860) 2 Sw. & Tr. 67; Gretna Green cases: see Brook v. Brook (1861) 9 H.L. 193; prohibitory impediment: Sussex Peerage Case (1844) 11 Cl. & F. 85.

⁹⁴ DICEY, Rule 182 at 736; WESTLAKE §§ 18, 25; FOOTE 101; also FOSTER, "Some Defects in the English Rules of Conflict of Laws," 16 Brit. Year Book Int. Law (1935) 84, 90 (although sharply disapproving of this view); 3 FRANKENSTEIN 85, and many other Continental writers. More hopeful of future better advised decisions: BECKETT, 15 Brit. Year Book Int. Law (1936) 46, 77-80, *supra* n. 69, and CHESHIRE 231.

Recently, the problem has been, if possible, still more confused by the question whether the matter pertains to "primary" or "secondary" characterization, see CHESHIRE 34-36; ROBERTSON, Characterization 239-245, CORMACK, "Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws," 14 So. Cal. L. Rev. 221 at 235; an unfortunate controversy, see also FALCONBRIDGE, "Renvoi and the Law of the Domicile," 19 Can. Bar Rev. (1941) 311, 338.

⁹⁵ [1908] P. 46, criticized by the Privy Council in Attorney General for Alberta v. Cook [1926] A. C. 444, 455; by the House of Lords in Salvesen v. Adm'r of Austrian Property [1927] A. C. 641, 646; by WESTLAKE § 25, CHESHIRE 338ff., BECKETT, 15 Brit. Year Book Int. Law (1936) 46, 80ff., *supra* n. 69; FALCONBRIDGE, 53 Law Q. Rev. 235, 247, ROBERTSON, Characterization 242, and many others. Only 1 BEALE 510, 2 BEALE 674, 679 n. 3, 1103, approves this decision.

been found, were it not for the misleading habit of English courts and writers, even such critics of current opinion as Cheshire and Beckett, customarily contrasting mandatory requirements with formal instead of with directory requirements. Instead of saying that in English family law the want of parental consent does not invalidate a marriage, every writer asserts that consent is a formal requirement in English matrimonial law; ⁹⁶ therefore, discussion continues whether it is such also in English conflicts law.

Hence, it is not certain that (1) a marriage official in England is empowered to officiate at an attempted marriage of foreigners that he knows is prohibited at their domicile because of lack of permission and that (2) a marriage celebrated in England would be held valid in the absence of parental permission, if this is an essential requisite under the domiciliary law for the validity of the marriage. These assumptions would be necessary, if it were true that the power given parents in Continental codes to interfere with their children's marriages "cannot be tolerated in England or the United States," as Wharton once asserted.⁹⁷ But at present nobody seems to envisage such a public policy. Dean Falconbridge hopes that English and Ontario courts will recognize the nullity of French and Quebec marriages in the absence of the requisite parental consent.⁹⁸

Less radical, an unusual provision of the Civil Code of Venezuela, article 134, declares, apparently on grounds of public policy (and not because of wrong classification), that lack of permission or lack of an "act of respect" does not invalidate a marriage, unless such permission or "act of respect" is required in the interests of ascendants or guardians.

⁹⁶ CHESHIRE 35, 231; FOSTER, 16 Brit. Year Book Int. Law (1935) at 90, *supra* n. 94. This formulation is also to be found in the critical report of FALCONBRIDGE, 3 Giur. Comp. DIP. no. 89, on the basis of a particular theory of classification against which CANSACCHI, *ibid.*, protests.

⁹⁷ 1 WHARTON § 253 at 573.

⁹⁸ Annotation [1932] 4 D.L.R. 1 at 35.

The formality of notification, of course, is adjusted everywhere to the modes available locally.⁹⁹

Although form and substance need not be distinguished in the United States, since the law of the place of celebration governs both, on grounds of public policy the domiciliary law is occasionally taken into consideration with respect to parental consent.¹⁰⁰ No such attention would be given to a mere formality.

(d) *Prohibition against remarriage.* A prohibition to contract a new marriage, not because of another existing marriage but as an effect of a former dissolved marriage, is considered a unilateral incapacity.

Illustrations: (i) An Italian married a widow, a citizen of Fiume, where Hungarian law was in force, before the expiration of the ten months' period prescribed by Hungarian law, the widow having obtained, however, a dispensation under Hungarian law granted to her upon a finding that she was not pregnant. The Italian Tribunal of Alba recognized the marriage,¹⁰¹ although Italian law did not admit such dispensation from its corresponding impediment.

(ii) A Belgian divorcée domiciled in Paris was held bound by the three hundred days' delay of the Belgian Civil Code (arts. 228, 296) and ineligible for dispensation under the analogous French provision.¹⁰² On the other hand, when the French provision is more severe than that of the national law, French courts are likely to insist upon the former.¹⁰³

(e) *Impotence.* Because of a personal characteristic of one party, a statute may give to the other an exclusive right to have marriage annulled. This is often assumed to be the case

⁹⁹ CUNHA GONÇALVES, 1 *Direito Civil* 679.

¹⁰⁰ Cf. the survey of cases given in *Sturgis v. Sturgis* (1908) 51 Ore. 10, 93 Pac. 696 and GOODRICH 312.

¹⁰¹ Trib. civ. Alba (Feb. 27, 1922) *Giur. Ital.* 1922, I, 2, 155.

¹⁰² Cour Paris (Nov. 30, 1934) *Revue Crit.* 1935, 486; cf. BATIFFOL, *ibid.* 616.

¹⁰³ See *infra* n. 152.

when a spouse is found to be impotent,¹⁰⁴ although this is not the only nor the most modern view. In consequence, it has been contended¹⁰⁵ that if, e.g., a Brazilian, married to a woman of French nationality, was affected by this condition, the wife could not avail herself of Brazilian law, and French law would afford her no relief on this ground.

Doctrine of bilateral prohibitions. Many obstacles involve both parties, even if founded on the qualities of one party. In this event, each party may avail himself of the remedy offered, irrespective of whether it is established by his own personal law. In other words, the personal law of either spouse decides whether a prohibition concerns one party or both; if both, the ensuing conflicts rule gives full international weight to the decision of the personal law.

(a) *Social policy.* Of such a bilateral nature are the enactments that forbid bigamy,¹⁰⁶ marriage between near relatives,¹⁰⁷ miscegenetic marriages,¹⁰⁸ marriages of lunatics, syphilitics, epileptics, drunkards, persons afflicted with contagious diseases, and the like.¹⁰⁹ Insanity falls into this category only when treated from the viewpoint of eugenics, not when considered a defect of consent.¹¹⁰

(b) *Adultery.* Doubts have been expressed concerning the scope of statutes under which, in the case of an adultery stated

¹⁰⁴ This was the justified construction of Italian C. C. (1865) art. 107, but has been changed by C. C. (1938) art. 121, C. C. (1942) art. 123.

¹⁰⁵ KAHN, 2 Abhandl. 63.

¹⁰⁶ See RG. (April 22, 1932) 136 RGZ. 142, 144-145 and RG. (June 8, 1936) 151 RGZ. 313, 317.

¹⁰⁷ E.g., under Swiss C. C. art. 100 no. 1, uncle and niece are prohibited from marrying if either one is a Swiss.

Swedish Marriage Law of 1920, c. 2 §§ 7, 8.

Great Britain: *Mette v. Mette* (1859) 1 Sw. & Tr. 416.

¹⁰⁸ Twenty-eight states of the United States, Germany, Italy, etc.

¹⁰⁹ Many states of the United States; Sweden, Denmark, Germany, and an ever-increasing number of other countries.

¹¹⁰ See RAAPE, 2 D.IPR. 144 n. 3, in opposition to KG. (Dec. 21, 1936) JW. 1937, 2039.

in a divorce decree, adulterer and paramour are forbidden to marry each other.¹¹¹

The German prohibition was considered bilateral under the Civil Code,¹¹² and the official comment on the recent Marriage Act has confirmed this interpretation.¹¹³ This means that both guilty persons are involved in the prohibition, and therefore the marriage is forbidden if the unmarried accomplice is a German, even though the adulterous spouse may be non-German.

Illustration: A German was divorced on the ground of adultery, then became a Polish national and wished to marry his paramour. The Prussian Ministry of Justice held that the unmarried woman, who was still a German citizen, needed a dispensation.¹¹⁴

In the Netherlands, this question is unsettled, but the courts treat the impediment as an obligatory policy of good morals, precluding marriage within the state by any guilty party mentioned in a divorce decree,¹¹⁵ no matter whether the judgment be domestic or foreign and whether or not the personal law so provides.¹¹⁶ In both Germany and the Netherlands, however, a marriage concluded in spite of the prohibition is not annulable.

(c) *Impediments connected with religion.* The famous Austrian religious impediments were intended to be bilat-

¹¹¹ E.g., Belgium: Law of April 16, 1935 (limiting the period of prohibition to three years).

Germany: BGB. § 1312, Marriage Law of 1938, § 9.

The Netherlands: BW. art. 89.

¹¹² RAAPE, 2 D.IPR. 144.

¹¹³ Ordinance of July 27, 1938, RGBL. I 923 § 5(5); ANZ, JW. 1938, 2072.

¹¹⁴ StAZ. 1934, 292.

¹¹⁵ H.R. (April 16, 1908) W. 8718, KOSTERS-BELLEMANS 135, Clunet 1912, 293 and H.R. (June 2, 1936) W. 1936, no. 1013, criticized by SCHOLTEN, N. J. 1936, 1013 and ASSER-SCHOLTEN, *Familierecht* 64. This criticism probably affects also the decision of Rb. Haag (Feb. 1, 1935) W. 12974, whereby the prohibition does not concern a foreign woman who has received a dispensation from an analogous impediment under her own law.

¹¹⁶ Rb. Amsterdam (Nov. 12, 1936) W. 1937, no. 270.

eral ¹¹⁷ and were so applied in the countries where they were in force. The same is true for the impediment of difference of faith as it still exists in Egypt ¹¹⁸ and elsewhere. ¹¹⁹

The Spanish provision, now again in force, whereby no one is allowed to marry a divorced person, also is a bilateral prohibition directed against both parties to the intended marriage. Thus, under Spanish law, a French divorced woman cannot marry a Spanish bachelor. In France, however, not less than three different opinions have been expressed: ¹²⁰ that the prohibition is unilateral but as such makes the marriage invalid; ¹²¹ that it is bilateral but the capacity of the woman depends on French law alone; ¹²² and that Spanish law is primarily applicable but eliminated by French public policy. ¹²³

(d) *Sham marriages*. An obvious but notable example of a twofold defect is presented by the case of parties who go through a ceremony of marriage for some purpose other than that of creating a true marriage. Legislation that regards marriage essentially as a contract, is inclined to deny validity to simulated consent to marry; thus canon law, ¹²⁴ as well as

¹¹⁷ See the explicit exposition by WALKER 602 ff.; it may be remembered that these impediments were not applied if the parties married abroad and did not intend to go to Austria. Similarly, Spain: Trib. Supr. (July 10, 1916) 137 Sent. 105.

¹¹⁸ Moharem Benachi c. Salomon Sasson, Mixed Trib. (June 11, 1913) 3 Gaz. Trib. Mixtes no. 428 (Egyptian woman, forbidden under Moslem law to marry foreign Christian; marriage internationally invalid).

¹¹⁹ Poland: Supr. Ct. (July 22, 1924) Revue 1925, 440; Supr. Ct. (Nov. 11, 1933) Z.f. Ostrecht 1934-1935, 444.

Czarist Russia and Lithuania: BÜCHLER in StAZ. 1929, 192 to the effect that Christians as well as Jews are prohibited by their respective religious laws recognized by the state.

¹²⁰ Special literature: CHAMPCOMMUNAL, in "Conflit de lois nouveau," Revue 1921, 41, 47ff; SERIN, Les conflits des lois dans les rapports Franco-Espagnols en matière de mariage, de divorce et de séparation de corps (Toulouse, 1929).

¹²¹ Trib. civ. Montpellier (March 18, 1920) S. 1921.2.11, Revue 1921, 79, Clunet 1920, 633.

¹²² App. Aix (Jan. 24, 1924) Gaz.Pal.1924.1.507, Revue 1924, 99, 277, Clunet 1924, 670 (cumulating the various *rationes decidendi*).

¹²³ Trib. civ. Seine (May 5, 1919) S.1921.2.9, Revue 1919, 543. Recently prevailing opinion has favored this interpretation. Cf. AUDINET, 11 Recueil 1926 I 175, 182; J. DONNEDIEU DE VABRES 443.

¹²⁴ Codex Juris Canonici c.1086 § 2.

French, Scotch, English,¹²⁵ and probably American opinion,¹²⁶ consider the marriage in such case void. Modern codifications presume that a public formal declaration of marriage should not be disavowed by revealing an intention to misuse the marriage institution. But recently in Germany, marriage for the sole purpose of procuring a name for the woman¹²⁷ or merely to give her the nationality of the husband,¹²⁸ has been excepted and considered void. In Switzerland similar rules were advocated¹²⁹ and have been adopted in a changed practice of the Federal Court and the Swiss Government.¹³⁰ The United States has reacted against sham marriages designed to facilitate immigration; the Federal Act of May 14, 1937, simply orders deportation. In all these cases it is sufficient that one personal law establish the invalidity.

Illustration: During World War I, a French girl married an American in Turkey with the understanding that she should escape internment in a camp and that the marriage should serve no other purpose. The Tribunal of Grenoble declared this marriage void according to French law, regardless of the law of the domicile of the American husband.¹³¹

Time element. It is well settled that the applicable personal law is the personal law as of the time of the celebration of the

¹²⁵ *M'Innes v. More* (H. L. 1785) 3 Craig. & St. 40; *Taylor v. Kello* (1787) 3 Craig. & St. 56; also *Dalrymple v. Dalrymple* (1811) 2 Hag. Con. 54, 101, 161 Eng. Rep. 665, 802.

¹²⁶ Cf. BISHOP, 1 New Commentaries on Marriage §§ 328ff.

¹²⁷ BGB. § 1325a (Law of Nov. 23, 1933).

¹²⁸ Marriage Law of 1938, § 23 par. 1; and RG. (April 7, 1938) 92 Seuff. Arch. 311 no. 129.

¹²⁹ See EGGER in *Festgabe für Fritz Fleiner* (1937) 85; RICHARD, "Les mariages fictifs," 66 Bull. Soc. Législ. Comp. (1937) 337.

¹³⁰ BG. (November 9, 1939) 65 BGE. II 133 and (Oct. 18, 1940) 66 BGE. II 225. In both cases a Swiss citizen had married a German woman threatened by expulsion because of her behavior; the courts stated in both cases that the woman had not intended permanent marital community. The Federal Council, by Order of Dec. 20, 1940, article 2, par. 2 has even authorized the Just. Dep. to annul nationality acquired by such marriages; see 38 SJZ. (1941) 173.

¹³¹ Trib. civ. Grenoble (July 11, 1923) cited by J. DONNEDIEU DE VABRES 440 n. 1. Cf. 2 STREIT-VALLINDAS 291 n. 28; RG. (Dec. 15, 1930) JW. 1931, 1340.

marriage¹³²—not that to which a party is subject at a time prior to or subsequent to the marriage.

Consequently, a defect inhering in a marriage at its inception is not cured by the acquisition of a new domicile or a new nationality; a void marriage remains void.

Exceptions have been made, however, in favor of validity. Thus, the German Reichsgericht in a recent case¹³³ had to deal with a marriage void under Austrian law on the ground of disparity of cult (Christians and non-Christians), the parties having changed their Austrian nationality for that of Italy. The court saw no reason why it should invalidate a marriage considered valid in the new homeland because of public policy contrary to the impediment. Likewise the Kammergericht in Berlin stated recently¹³⁴ that, if both husband and wife voluntarily acquired a new citizenship, their marriage could not be declared void on a ground not recognized as an impediment under their new law.¹³⁵

Conversely, a valid marriage is not affected by a change of personal law; for instance, where a former French Catholic priest married and afterwards became a citizen of Spain, the

¹³² Germany: RG. (Dec. 17, 1908) JW. 1909, 78; RG. (Feb. 15, 1926) 113 RGZ. 38; RG. (June 23, 1930) IPRspr. 1930, no. 65; RG. (Dec. 15, 1930) JW. 1931, 1340; 46 Z.int.R. (1932) 14; RG. (June 22, 1931) 133 RGZ. 161, and others.

France: App. Chambéry (Feb. 7, 1885) Gaz.Pal.1885.1.703, Clunet 1888, 796.

¹³³ RG. (May 16, 1931) 132 RGZ. 416, JW. 1932, 227. In this case the Reichsgericht went so far as to reverse the principle, holding that the decisive time should be that when the action for annulment is brought. But this can hardly be taken literally in view of the general rule illustrated in the preceding note.

¹³⁴ KG. (Aug. 5, 1937) JW. 1938, 855 (marriage celebrated in 1916 before the German consulate in Adana, Chile, between a German woman and a Russian who afterwards became a Chilean subject; error as to the personal qualities of the husband entitled her to sue for nullity under German BGB. § 1333 but not under Chilean Law of Jan. 10, 1884, art. 33; she was held to be deprived of the right under German law if she had become a Chilean national on her own application; if only the husband had applied, her citizenship would depend on the validity of the marriage. In a note MASSFELLER, without protesting, expresses doubts).

¹³⁵ BARTIN, 2 Principes 122 suggests that a defect that can be cured according to prior law should be eliminated by a new law not retaining the impediment but that an "absolute" voidness cannot be cured.

marriage would not be invalidated under French law and probably not under Spanish law.

A far-reaching deviation from this principle is implied by the *Código Bustamante*, article 40, whereby any country is entitled to deny recognition to a marriage, if the marriage is contrary to certain expressly enumerated prohibitions of the forum. This provision, taken literally, would entitle Brazil to declare void a marriage celebrated validly in Chile between an uncle and his niece,¹³⁶ if the parties became citizens of Brazil and perhaps even if they did not. Such an application of public policy would be unreasonable, unless the court believed the continuance of the marriage within the forum to be as shocking as did the Ohio Supreme Court in the famous case of *State v. Brown*.¹³⁷

3. Prohibitive Public Policy of the Country of Celebration

The Hague Convention. The Hague Convention on Marriage reduces the prohibitory effect of domestic marriage impediments to a few fundamental points. This was the main achievement of the Hague treaty. It includes five prohibitions, entitling the participant states to prevent the celebration of marriages on grounds, not of the personal law of the parties, but of its own local law:

- (a) Absolute prohibition on account of relationship or affinity;
- (b) Absolute prohibition between parties to adultery, provided the marriage of one of them has been dissolved on the ground of this adultery;
- (c) Absolute prohibition between persons who have been convicted of a joint attempt upon the life of the spouse of one of them;
- (d) Prohibitions concerning a former marriage;
- (e) Religious prohibitions.

¹³⁶ Argued by M. WOLFF in 4 *Rechtsvergl. Handwörterb.* 403.

¹³⁷ (1890) 47 Ohio St. 102, 26 N. E. 74.

The grounds for the first three prohibitions listed above are contained in article 2, paragraph 1; the last two are implied in article 2, paragraph 4.

An absolute prohibition is a prohibition which is not dispensable. In case of adultery, for instance, dispensation may be granted in Germany; Swiss parties, their national law including no prohibition at all to marriage on account of adultery, may therefore marry in Germany. The Dutch courts, however, consider adultery an absolute obstacle both for nationals and foreigners.¹³⁸

In the countries that have been or still are members of the Convention, every prohibition of local law has been examined in this way to meet the test of article 2. The Convention goes still further in limiting the local prohibitory rules. If a marriage has been celebrated in violation of one of the prohibitions listed above but is valid according to the personal law of the parties, it is valid everywhere with the exception that it may be considered invalid in the state of celebration (not in a third state) in the cases mentioned in (d) and (e), not (a)–(c) above.¹³⁹

Hungary, for instance, may forbid an ordained Catholic priest of Belgian nationality to marry within Hungarian territory; if he succeeds in doing so, however, Hungary may consider the marriage void, but it is valid in Belgium and therefore in all other participant states.

No prohibition other than those mentioned above is proper ground for preventing a marriage of nationals of another member state. Hence, an Italian girl fourteen years old or a Rumanian girl of fifteen may marry in Switzerland or Sweden, where the age limits are seventeen and eighteen respectively.

Código Bustamante. The *Código Bustamante*, article 38,

¹³⁸ Settled doctrine, see H. R. (June 2, 1936) W. 1936, no. 1013, and cf. 11 Z.ausl.PR. (1937) 205.

¹³⁹ The Polish Law on international private law of 1926, art. 12 par. 2, was drafted less clearly; see Pol. Supr. Ct. (Jan. 7, 1931) 6 Giur. Comp. DIP. (1940) no. 104, with a critical note by RENCKI.

permits the local law to avail itself of (all) its prohibitions which are not dispensable. Article 40 adds a rule for marriages already celebrated, whereby "the contracting states," i.e., as it seems each of them, may refuse recognition to a marriage conflicting:

With their provisions relative to the necessity of dissolution of a former marriage, to the degree of consanguinity or affinity, in respect to which there exists an absolute impediment, to the prohibition of marriage established in respect to those guilty of adultery by reason of which the marriage of one of them has been dissolved, to the same prohibition in respect to one guilty of an attempt against the life of one of the spouses for the purpose of marrying the survivor, and to any other excusable grounds of annulment.

Trend. International literature, long critical of unlimited local policy, has encouraged the trend towards restricting its influence. This tendency is exhibited in the Polish Statute of 1926 (art. 12 par. 2) which confines the cases of overriding local policy to four enumerated impediments. That the Italian Civil Code of 1865 (art. 102 par. 2) reserved to the local law every prohibition contained therein (arts. 55-69), was considered an "excessive and irrational" rule,¹⁴⁰ needing a restrictive interpretation,¹⁴¹ although hardly seeming to permit it.¹⁴² The new Code no longer tries to override the nationality principle¹⁴³ to such an extent and enumerates the prohibitions that are intended to apply to foreigners.¹⁴⁴ It is true that foreign Catholics desiring a canon law marriage with civil effect must comply not only with civil requirements but with all those established by the canon law and their national laws.¹⁴⁵ In

¹⁴⁰ UDINA, 6 Répert. 513, no. 139; UDINA, Elementi 177, no. 127.

¹⁴¹ Cf. KUHN, Comp. Com. 128.

¹⁴² ANZILOTTI (1919) 236; UDINA, Elementi 178, no. 127, n. 2.

¹⁴³ Relazione del Guardasigilli on. Solmi (Report of the Minister of Justice) in C. C., book I, Progetto definitivo (1936) 54.

¹⁴⁴ C. C. (1938) art. 114 par. 2, C. C. (1942) art. 116 par. 2. The Minister of Justice declined to include Italian provisions on nonage in the list of indelible impediments, where the personal law does not infringe public policy, See Relazione 1938 no. 78.

¹⁴⁵ FEDOZZI 425.

Spain, a similar position seems to be taken, all the Spanish requirements for Catholic marriage being added to those of the national laws.¹⁴⁶

Another example of increased understanding is that of a recent Greek decision confining to Greek subjects the old prohibition of marriage between Christians and non-Christians.¹⁴⁷

The Scandinavian Convention on Family Relations¹⁴⁸ incorporates chiefly nondispensable prohibitions arising out of relationship and affinity, and the Finnish law of 1929¹⁴⁹ enumerates only relationship, affinity, and existing marriage as obstacles under local policy.

But exaggerated mandatory local requirements are still frequent. The period of delay instituted for women after the dissolution of a former marriage figures in the list of compulsory prescriptions of local policy in Switzerland,¹⁵⁰ the Netherlands,¹⁵¹ and France.¹⁵² The most recent civil code,

¹⁴⁶ Spanish Trib. Supr. (July 10, 1916) 137 Sent. 105. Cf. TRÍAS DE BES, 31 Recueil 1930 I 674.

¹⁴⁷ Court of Athens (1937) no. 2462, Clunet 1938, 902, on the ground of Cod. Just. L. 1, 9, 6 of A. D. 388; Basilica L. 1 Tit. 1, 38, and Rule 72 of the H. Synod of Troullos.

¹⁴⁸ Final Protocol no. 1. According to no. 2 of the Final Protocol, persons who have acquired full age by marriage under Finnish law or by dissolution of marriage under Icelandic law, may be prevented from marrying unless they are twenty-one years old.

¹⁴⁹ Finland: Law of Dec. 5, 1929, on Family Relations of International Nature, § 2 par. 2, and § 6 par. 3.

¹⁵⁰ See Swiss C. C. art. 103 and BECK, NAG. 167 n. 53.

¹⁵¹ The Netherlands: Rb. Amsterdam (Nov. 11, 1925) N. J. 1926, 391 (Russian bride); H. R. (June 2, 1936) W. 1936, no. 1013 (applying Hague Convention on Marriage of 1902, art. 2 par. 2). A convenient exception was made for a Norwegian woman, first separated under the Norwegian Marriage Law of May 31, 1918, § 43, and then divorced more than a year later: Rb. Rotterdam (Feb. 2, 1937) W. 1937, no. 482.

¹⁵² France: C. C. art. 228; Cour Paris (Feb. 13, 1872) S.1873.2.112, D.1873.2.160, (public policy "of decency"); WEISS, 3 Traité 486; POULLET 449 no. 350. The same doubtful assertion was made even under the Hague Convention on Marriage of 1902, art. 2 par. 3. Prevailing opinion *contra* in Switzerland, cf. BECK, NAG. 289 no. 17. In France this doctrine has been elaborated; the foreign law may be applied when it requires an even longer delay. Cass. (Nov. 27, 1934) Nouv. Revue 1934, 796 (Swiss delay for divorced women; no cur-

that of Venezuela, has retained its long and exacting list.¹⁵³ Thus, the result is the same as when the law of the place of celebration is taken as decisive, and therefore all requirements of the local law as well as of the personal law impede the marriage of foreigners.¹⁵⁴

Effect of treaties and conventions. Has the adherence of a state to a treaty, such as the Hague or the Montevideo treaties, or a state's participation in the Scandinavian Convention, any effect beyond the scope of the treaty, generally limiting the realm of unyielding public policy? Some Italian decisions¹⁵⁵ and a few writers¹⁵⁶ have answered this question affirmatively with respect to the Hague Convention. They argue that states, having once subscribed in a treaty, for example, to the principle that the domestic age limit is alterable for foreigners, can no longer allege the contrary with respect to nationals of non-member states. Such a construction of an international treaty is not only untenable but would indeed endanger the conclusion of future treaties. Treaties are binding upon states only within their limits.

4. Permissive Public Policy of the Country of Celebration

The Hague Convention. According to article 3 of the Hague Convention, the law of the place of celebration may permit the marriage of foreigners contrary to their national laws, if these prohibitions are based exclusively on grounds of a religious nature. The other states are entitled to deny to a marriage contracted under such circumstances recognition as a valid marriage.

tailment by dispensation); Cour Paris (Nov. 30, 1934) *Nouv. Revue* 1935, 49, *Clunet* 1935, 927.

¹⁵³ Venezuela: C. C. (1916) art. 132, C. C. (1942) art. 104 referring to all mandatory requirements valid for nationals.

¹⁵⁴ See *supra* n. 47.

¹⁵⁵ See *infra* pp. 291ff.

¹⁵⁶ WEISS, 3 *Traité* 478 n. 2; POULLET 444ff.; AUDINET, 11 *Recueil* 1926 I 174, 186; 3 FRANKENSTEIN 113 n. 202; *ibid.* 195.

Contra German RG. (Dec. 21, 1916) JW. 1917, 364; M. WOLFF, IPR. 119.

Which impediments are of religious nature? The question has been extensively discussed in the countries whose liberal doctrine denies recognition to foreign discriminations on account of religion. In agreement with the dominant opinion of these countries, the commentators on the Convention ascribe religious character to prohibitions based on:

- (a) Difference of religion (*disparitas cultus*),¹⁵⁷ such as the canon law prohibition of marriages between Christians and non-Christians in Austria, Spain, Poland, Bulgaria, and Greece; the prohibition of marriages between Christians and pagans in Sweden; between Moslems and non-Moslems according to the laws of Islam; and between Jews and non-Jews under Jewish law.
- (b) The relation between godfather and godchild (*cognatio spiritualis*) under canon law¹⁵⁸ and in Rumania.
- (c) The vows of priests or monks, endowed with civil effect in former Austria, Spain, parts of Yugoslavia, Poland, and Hungary.¹⁵⁹

It is doubtful, however, whether article 3 applies to a former marriage still considered existent for religious reasons

¹⁵⁷ Not recognized: by enacted law in Venezuela, C. C. (1942) art. 105; by the courts in:

France: Cour Paris (Nov. 17, 1922) S.1924.2.65, Clunet 1923, 85, Revue 1923, 437 (Serbian).

Switzerland: Kreisschreiben (June 30, 1928) n. 13, 25 SJZ. 183.

Italy: Trib. Livorno (May 5, 1894) Clunet 1898, 415 (Jewish law); Trib. Torino (Oct. 18, 1910) Clunet 1912, 288, and Corte di Venezia (Dec. 7, 1910) Clunet 1911, 1326 (Austrian); App. Trento (March 8, 1928) Foro Ital. Rep. 1928, 1171, no. 27 (Austrian).

Germany: A much cited decision of the OLG. Hamburg (Oct. 6, 1908) 18 Z.int.R. (1908) 541 is to the same effect, but the prohibition was recognized by the OLG. Karlsruhe (March 28, 1917) 35 ROLG. 358 (marriage celebrated in London); and finally by the RG. (May 16, 1931) 132 RGZ. 416, 418 and RG. (Oct. 10, 1935) 148 RGZ. 383. Cf. RAAPE 239.

¹⁵⁸ Cf. the controversy between SATTER, 32 Z.int.R. (1924) 69 n. 88, and 3 FRANKENSTEIN 114 n. 204.

¹⁵⁹ Not recognized in France (*contra*: AUDINET, 11 Recueil 1926 I 174, 184).

Great Britain, cf. DICEY, Rule 183 Exc. 2.

Italy: Cass. Roma (July 31, 1924) Monitore 1924, 727.

despite a divorce (Italy¹⁶⁰ and, for Catholics, former Austria, Spain, and the Warsaw district).

No other prohibition established by the national law of a party may be neglected, not even the politically inspired impediments which the Western tradition is accustomed to disregard.¹⁶¹ Thus, military deserters and conscientious objectors from Austria and Germany, prevented from producing a certificate of ability to marry, had to be refused the right to marry in other member states.¹⁶² To France this result seemed so intolerable with respect to the emigrants from Alsace and Lorraine, that France left the Hague Convention on May 31, 1914, followed by Belgium on May 31, 1919. The Hague Conferences of 1925 and 1928 tried in vain to win these countries back by permitting a member state to ignore prohibitions arising from military obligations or from the status of a prince who needs the consent of the head of his house.

The Swiss authorities apply these prohibitions as well as the provisions of an Italian law of 1938 requiring governmental authorization for the marriage of an Italian to a person of other nationality.¹⁶³ On the same ground, German writers now claim that the German legislation on difference of race must be recognized by all other participants in the Convention.¹⁶⁴

It is, of course, left to the law of the place of the intended celebration whether or not it will respect a religious prohibi-

¹⁶⁰ Viewed as a religious impediment by WALKER 587, 588; SATTER, Note opposing App. Liège (Feb. 2, 1937) 5 Giur. Comp. DIP. 13 n. 11. Many writers think that art. 3, compared with art. 2 par. 3 and art. 6 par. 1, excludes the impediment of former marriage from the conception of religious impediments.

¹⁶¹ See *supra* pp. 106, 258.

¹⁶² Cf. Swiss Fed. Dep. of Justice, BBL. 1917, III 575, no. 14: canton governments may grant license to marry (under NAG. art. 7e par. 2 to foreign objectors and desertors only if they are subjects of states having not adhered or having left the Hague Convention).

¹⁶³ Swiss Just. Dep., BBL. 1940, 1463 no. 13, referring to art. 2 of the Italian Law of Nov. 17, 1938.

¹⁶⁴ Cf. the summary by RAAPE, 2 D.IPR. 159, 162.

tion of the homeland. Switzerland, e.g., respects such prohibitions in the case of non-resident foreigners, while it ignores them in the case of domiciliaries.¹⁶⁵ Third states are equally free to determine their position.

In general. Outside of the Hague Convention and apart from the religious prohibitions which have already been dealt with, all political and penal prohibitions of a foreign country are generally ignored. This liberal doctrine underlies the Civil Code of Venezuela,¹⁶⁶ which expressly rejects prohibitions of marriage founded on differences of race, class, or religion.¹⁶⁷

In view of the American discussions of the effect of remarriage prohibitions, it may be noted that the situation in other countries depends on analogous considerations. The first problem is to determine whether the law forbidding remarriage is intended to be applied abroad and, if so, to what marriages.¹⁶⁸ A prohibition meant to be applied extraterritorially may not be applied by another country because it is regarded

¹⁶⁵ BECK, NAG. 293 no. 12.

¹⁶⁶ Venezuela: C. C. (1916) art. 133, C. C. (1942) art. 105.

¹⁶⁷ Hindu caste: Chetti v. Chetti [1909] P. 67. Racial prohibitions: Trib. civ. Pontoise (Aug. 6, 1884) Clunet 1885, 296. The Danish Minister of Justice, by Circular of Oct. 12, 1937, informed interested officials that the German racial laws were applicable if no party was domiciled in Denmark. This seemed to indicate that a contrary policy was expected in the case where at least one party was a domiciliary; cf. RAAPE, 2 D.IPR. 160 n. 2, who also notes the reaction of other countries to the German "law for the protection of German blood" of Sept. 15, 1935.

An interesting combination of considerations may be illustrated by a South-African decision. In the Roman-Dutch law, the old rule of *lex loci contractus* still obtains. In addition, the facts that the bride was domiciled and the marriage was celebrated in the forum, Natal, formed grounds to disregard the inability of the man, under the common law of his domicile in Transvaal, to marry his late wife's sister. *Friedman v. Friedman's Executors* (1922) 43 Natal Law Rep. 259, at 264, 266.

¹⁶⁸ For instance, German courts have discussed at length whether by the enigmatic provision of the Argentine Civil Marriage Law (1888) art. 82, parties who have married in Argentina and have been divorced abroad are prohibited from remarrying only in Argentina or everywhere. See *infra* p. 432, n. 178.

as penal.¹⁶⁹ Otherwise, it applies as part of the personal law.¹⁷⁰

Relation to the forum. The subject under discussion furnishes significant applications of the general doctrine of public policy. To enforce a domestic policy upon a case subject to foreign law, a strong tie between the case and the forum should be present. Thus, Swiss law quite appropriately entitles a foreigner domiciled in Switzerland to invoke the Swiss Federal Constitution, as opposed to his national law, in protection of his right to marry. Political or racial prohibitions, even if not specifically eliminated by the Constitution, will be disregarded on behalf of a resident foreigner. A non-domiciled alien has no such right; on the contrary, the cantonal authorities are required to prevent him from entering into a marriage not recognized by his homeland.¹⁷¹

Some codes, it may be remembered,¹⁷² following the example of section 4 of the Austrian Civil Code, are restricted in their external effect to transactions intended to have effect within the territory of the personal law. The Austrian Supreme Court declared valid, despite Austrian impediments, a marriage celebrated abroad by an Austrian citizen, in the absence of intention to return to Austria immediately. This rule was applied even to former Catholic priests and to marriages be-

¹⁶⁹ England: *Scott v. Att. Gen.* (1886) 11. P.D. 128 declared inoperative the South African restriction on remarriage by the guilty party.

France: Trib. civ. Marseilles (Nov. 25, 1925) Clunet 1926, 388 refused recognition to a Serbian episcopal decree of divorce, because it contained a clause making remarriage dependent on the bishop's consent, which the court deemed inseparable, but the court should have recognized the divorce without the remarriage clause, see Note in *Gaz. Pal.* 1926. 1. 442.

Germany: KG. (May 30, 1938) JW. 1938, 2750 refused to apply the delay for remarriage imposed by a Swiss court in accordance with arts. 104 and 150 of the Swiss C. C. because of its penal ("somewhat disgracing") character.

Switzerland: Prohibition of remarriage declared in a divorce decree by a Yugoslav bishop is not recognized, *Just. Dep.*, BBl. 1928, II 309.

¹⁷⁰ England: *Warter v. Warter* (1890) 15 P.D. 152 per Sir James Hannen, Pres., recognizes a six months' delay after decree under the Indian Divorce Act, No. 4 of 1869. See also *supra* p. 269.

¹⁷¹ HUBER-MUTZNER 430, gives a clear picture; BECK, NAG. 205 no. 49.

¹⁷² *Supra* p. 117, n. 55.

tween Christians and Jews.¹⁷³ Thus, a foreign court had no need to resort to its own public policy to allow such a marriage.

Consequences of a state's acts. A permissive policy of the country of celebration may be based upon reasons different from those thus far mentioned. Shall the forum permit a party locally divorced, which divorce is not recognized by his personal law, to remarry? This problem arose in Germany out of two apparently conflicting rules, viz., one determining according to the personal law whether a person is married or unmarried (EG. art. 13 par. 1) and the other ascribing full credit to a domestic divorce decree.¹⁷⁴ The second rule ought to be enforced, if the authority of the state is to be maintained consistently. A state is not supposed to dissolve a marriage and yet deny the parties the advantages of the dissolution. In Switzerland, however, the majority opinion has taken this very position;¹⁷⁵ hence, a marriage between an Italian and a Swiss woman may be dissolved in Switzerland, but the right of remarriage is enjoyed only by the woman.¹⁷⁶

5. Sanctions for the Fulfillment of Intrinsic Requirements

Certificate of ability to marry. Officials issuing marriage licenses or presiding at marriage ceremonies are in an unfavorable position to ascertain the impediments of a foreign candidate. A large number of countries, therefore, require foreign

¹⁷³ OGH. (May 24, 1907) Spruch-Repertorium no. 198, 10 GlU.NF. no. 3787 and OGH. (July 17, 1906) 9 GlU.NF. no. 3485 (Austrian Catholic marrying an Austrian Jewess in New York). Singular distinctions were developed. For instance, the Austrian prohibitions upon marriage were maintained where an Austrian abroad had a job, the loss of which would force him to return to Austria, OGH. (Oct. 28, 1936) 55 Zentralblatt (1937) 120 no. 50; See also OGH. (July 23, 1937) 56 Zentralblatt (1937) 889.

¹⁷⁴ Two opinions correspond to these two rules. The first opinion, stressing the conflicts rule of EG. art. 13, was advocated by LEWALD 118; RAAPE 404; OLG. Hamburg (Jan. 3, 1923) 78 Seuff. Arch. 57. The second opinion: KG. (March 13, 1911) 24 ROLG. 19; REICHEL, 124 Arch. Civ. Prax. 200; MASSFELLER, StAZ. 1938, 112, 115; Dt. Justiz 1939, 1236ff.

¹⁷⁵ BBL. 1922, II 582 no. 14 (Spaniard); BECK, NAG. 464 no. 223.

¹⁷⁶ See for fuller discussion *infra* pp. 517-519.

nationals or domiciliaries to exhibit a certificate issued by a competent officer in the country from which they come, to the effect that to his best knowledge no impediment is known to the prospective marriage.¹⁷⁷ Accordingly, in a great number of states, measures have been taken, and offices have been designated,¹⁷⁸ for the issuing of appropriate certificates to be used abroad.¹⁷⁹ The Hague Convention on Marriage, article 4, paragraph 1, prescribed this precaution to the extent that the Convention adopted the rule of national law. Some important countries are unwilling to issue such certificates;¹⁸⁰ therefore, either dispensation in the country of celebration is frequently obtained,¹⁸¹ or "certificates of custom" are produced.¹⁸²

The underlying idea of this institution is clearly demonstrated in Switzerland; foreign citizens intending to marry

¹⁷⁷ E.g., Austria: Hofkanzleidekret of Dec. 22, 1814, Justizgesetzsammlung No. 1118.

Finland: Gen. Ord. of Dec. 28, 1929, cf. SAINIO in 4 Leske-Loewenfeld I 680 n. 56.

Germany: BGB. § 1315 par. 2, Marriage Law of 1938, § 14 par. 1. Cf. RAAPE 264, on the complicated case of a foreign annulment not recognized.

Hungary: Marriage Law of 1894, § 113 par. 3.

Italy: C. C. (1865) art. 103, C. C. (1938) art. 114 par. 1, C. C. (1942) art. 116 par. 1, not abolished as had been proposed.

Sweden: Royal Ord. of Dec. 3, 1915.

Switzerland: NAG. art. 7c, BECK, NAG. 185, 200.

¹⁷⁸ BOSCHAN in 5 Zausl.PR. (1931) 332 n. 2 gives a list of offices declared competent in numerous states.

¹⁷⁹ In some countries banns are issued before giving the certificates, as in Hungary, Luxemburg, and Switzerland.

¹⁸⁰ This is true particularly for Great Britain (excepting treaties concluded on the basis of the Marriage with Foreigners Act, 1906) and almost all the states of the United States, except perhaps Wyoming, where a provision corresponding to § 3 of the Uniform Marriage Evasion Act is in force. (L. 1935, ch. 3 § 1, Suppl. 1941 to Rev. St. Ann. 1931, 68-106). On the difficulties caused by this attitude see HACKWORTH, 2 Digest of International Law (1941) 356 § 161.

In France a "certificat de non-opposition" may be issued, but it is not recognized as equivalent to a certificate of "no impediment."

¹⁸¹ E.g., Switzerland and in all cases of Americans, Federal Council, BBL. 1887, III 700; Just. Dep., BBL. 1922, II 581 no. 13, in view of the recognition, in the United States, of Swiss marriages celebrated according to Swiss law.

Germany: Allg. Verfügung des Reichsministers der Justiz, Feb. 4, 1936, Dt. Justiz 1936, 208 and Durchführungs VO. zum Ehegesetz of July 27, 1938, § 7.

¹⁸² Mostly through the diplomatic service of the country of celebration; see Swiss Just. Dep., BBL. 1938, II 498 no. 7.

within the country must apply to the government of the canton for permission and, with the constitutional exception of domiciled foreigners,¹⁸³ are not permitted to marry unless it is shown that the marriage would be recognized in the homeland.¹⁸⁴

Dispensation. Dispensation, likewise, is governed by the personal law. Not the law of the place of celebration but the personal law determines what officials are competent to grant dispensation from any prohibition to marry.¹⁸⁵

Effect of violation of personal law. Because of the broad scope of the personal law, it is necessary to determine what law governs the effects of a violation of its prescriptions. As we have seen in connection with formal prescriptions, the dominant opinion is that the same internal law that establishes a requirement determines the effect of failure to comply with the requirement.¹⁸⁶ Covered by this rule are the problems whether a prohibited marriage is valid in spite of the prohibition or whether, if not, it is absolutely null (nonexistent), conditionally valid until annulment, or voidable at the instance of certain persons; whether or not an annulment has retroactive effect; by what persons action may be brought; whether an annulment may be pronounced by persons other than judges; by what events the right to annul is extinguished, etc.

¹⁸³ Swiss Federal Constitution art. 54 par. 3; NAG. art. 7e. Where the bridegroom is of Swiss nationality, authorization is unnecessary, Just. Dep., BBl. 1925, II 143 no. 12.

¹⁸⁴ HUBER-MUTZNER 433.

In Germany, besides the certificate of ability, other documents are required, such as a certificate that the husband's nationality will not be lost by marriage under foreign law; another showing that the husband transfers his nationality to the bride is probably obsolete. Moreover, it is remarkable that where religious marriage is compulsory in the homeland of a party, Germany and Switzerland require a priest to declare himself ready to marry the parties. Cf. *supra* p. 214, n. 55.

¹⁸⁵ KOSTERS 366 states this principle and exceptions thereto granted by Royal favor in the Netherlands.

Switzerland: Just. Dep., BBl. 1922, II 581 no. 11 points out: a Swiss cannot marry his late wife's sister who is of Italian nationality, unless she receives dispensation under Italian C. C. (1865) arts. 59, 68, and hence produces an Italian certificate of *nihil obstat*.

¹⁸⁶ See citations *supra* p. 229, n. 121.

Where the parties have different personal laws, each of the two laws must be consulted with respect to the consequences of a violation. The law of the husband may give him an exclusive right to avoid the marriage or may perhaps entitle the wife alone to do so; sometimes both laws concur in the same or in more or less similar effects. In addition to the illustrations implied in the cases discussed above, the following may be of interest:

(i) Case decided by the Reichsgericht on January 20, 1928 (120 RGZ. 35): In 1910 two Swiss citizens, A (male) and B (female) married in Salt Lake City, Utah. Without having obtained a divorce from A, the wife B married C, a German citizen, in Indianapolis, Indiana, in 1916. Not until 1918 was the marriage between A and B dissolved by divorce. In 1921 C, who had meanwhile returned to Germany, received knowledge of B's previous marriage to A, and thereupon B and C separated. Upon inquiry, C was told by an American Military Commission in Germany that his marriage with B was null and void. Thereupon, in 1924 C went through a German ceremony of marriage with D. When the validity of this last marriage came up for determination by a German court, this court, according to the German choice of law rule, had to test the validity of the marriage between B and C by the national laws of these parties, i.e., simultaneously by German and Swiss law. By article 7f of the Swiss Law on Conflicts, the court would have been referred to the law of Indiana. Under Indiana law, the marriage was absolutely nonexistent, while German law merely regarded it as destructible *ex tunc* by decree of court. Following the general Continental approach of applying to such cases the law establishing the more severe sanction, the court should have found the second marriage void without any legal process and the third marriage valid. By inadvertence, the Reichsgericht overlooked the renvoi of the Swiss statute on conflicts and, instead of Indiana law, applied as B's personal law the law of Switzerland, which it held to be identical with that of Germany.¹⁸⁷ Hence, the court held

¹⁸⁷ This finding was not entirely correct either. Under German law an annulment of a bigamous marriage destroys the marriage *ex tunc*; it is effective only *ex nunc* in Swiss law. The sanction of the German law is the more severe and should have been applied.

that C's marriage to B was valid when he married D, that the marriage with D, objectively considered, was adultery and that B would be entitled to a divorce.

(ii) Let us assume that in 1916 B had married in Iowa¹⁸⁸ instead of in Indiana;¹⁸⁹ then the infirmity of the marriage would have been cured by the divorce of 1918. The same would have resulted if they had married in Sweden.¹⁹⁰

(iii) The following situation is quite different. A German girl, fifteen years old and domiciled in Switzerland, marries somewhere, her age being concealed. Germany claims her as a national, Switzerland as a domiciliary. The marriage would be considered void (annullable) in Germany and voidable in Switzerland.

Evasion of directive requirements. Since the effect of a violation of a requirement depends on the law establishing the requirement, it follows that the effect is the same whether the marriage takes place abroad or at home. Thus, the Dutch requirement of parental consent, being merely a directive prescription, does not invalidate a foreign marriage, although the wording of the Dutch conflicts rule could be understood to entail invalidity.¹⁹¹ In other words, evasion of directive requirements by a foreign marriage is of no consequence. This result is certain. It is obscured only by the usual idea that, in a well-ordered system of civil status, even non-mandatory rules of domestic marriage laws are securely protected against violation.

IV. CONCLUSIONS

The law of the place of celebration, which governs without qualification the substantive requisites of marriage in the

¹⁸⁸ Iowa Code (1939) § 10445 subsec. 4, § 10486 subsec. 3.

¹⁸⁹ See *Compton v. Benham* (1909) 44 Ind. App. 51, 85 N. E. 365; *Simms v. Kirk* (1924) 81 Ind. App. 515, 144 N. E. 146.

¹⁹⁰ Swedish Marriage Law of June 11, 1920, c. 10 § 1 par. 2.

¹⁹¹ Dutch Supreme Court, H. R. (May 23, 1919) W.10436, N. J. 1919, 689, in opposition to the questionable text of BW. art. 138.

Likewise, for instance, to avoid nullity Belgian citizens are bound to observe only mandatory requirements abroad, i.e., the requirements of age, consent, relationship and affinity. See PAGE, 1 *Droit civil belge* (1933) no. 692.

United States and Argentina, contrasts with the personal law observed as a matter of course everywhere else. The contrast is striking enough to offer a legislative problem, a problem aggravated by the limited knowledge we have of the exact reasons at present for the American system. The historic background is obvious. Those of the statisticians who advocated the law of the place where the marriage is celebrated, did no more than apply the rule they taught for contracts in general, and their main impulse in establishing the rule sprang from self-sufficient territorialism. We may presume the same conception to have prevailed in America, while it remained a country dependent on immigration and pioneering. Requirements of the old countries were not to impede the marriages necessary to new settlers. It was fair to replace them by the demands of an honest Christian commonwealth. All this is understandable without much research.

However, for a considerable period, neither immigrants nor pioneers have typified the shifting population of this country. Nevertheless, while in each of the forty-eight jurisdictions the legislature occupies itself with enactments elaborately shaping the requirements for marriage, marriages out of the state are fairly numerous, and the conflicts rule permits citizens to choose at pleasure any one of all these statutes, to which to submit both the celebration and validity of their marriages. This equation of intrinsic with formal requirements is no longer appropriate. While the various forms of secular ceremonies solemnizing marriage are interchangeable, the very different kinds of marriage impediments in the statutes are not thought of as equivalent in any way in the mind of the legislators. Yet, under the conflicts rule, they are all treated in the same way.

The harm done by indiscriminate application of local law, however, involves more than trespassing on the domain of foreign state legislation. First, social progress achieved in one jurisdiction in the field of eugenics—as respects insanity,

medical certificates, etc.—is freely frustrated in others.¹⁹² Granted that some reformers of marriage welcome the unbounded multitude of marriage statutes as an immense laboratory for social experimentation—an attitude rather questionable—here freedom is converted into anarchy. Second, if the state of the domicil reacts against foreign violation of its policy, the great advantage of the principle that a marriage is good if valid at the place of celebration, disappears. Nevertheless, the implications of the legislative power and of specific marriage policies are being more distinctly realized, and the cases where a marriage is held void at the domicil of a party grow more frequent.

Under these circumstances, the failure of the Uniform Marriage Evasion Act to rally the states to the principle that marriages concluded contrary to the domiciliary law should be avoided is most regrettable. Could it be that its reforms were not sufficiently clear and adequate to be considered worthwhile? Probably, they were regarded as inefficient in the absence of more effort than the Act dared to require. No machinery for enforcement was provided to prevent false allegations by the parties and to effectuate interstate exchange of legal requirements and personal records. Nor has the one state that adopted the section in the Uniform Act requiring the license issuer to ascertain whether the proposed marriage contravenes the home statutes of the parties, been interested to prescribe investigation of the alleged facts. It may have been premature to expect more. Today in many jurisdictions, as a hundred years ago, marriage licenses are granted with the greatest facility and promptness. While a growing number of statutes stress the necessity of proofs of age, parental consent, and freedom from dangerous diseases, as well as banns or notice

¹⁹² The marriage of a fourteen-year-old girl from Wisconsin marrying in Minnesota was declared in Iowa voidable only according to the Minnesota statute of the time (*cf.* at present *Mason's Minn. St. Suppl.* 1940, § 8580) despite the prohibition and the evasion statute of Wisconsin. See, in contrast, *supra* p. 254, n. 37.

of intention to marry, others have repealed the requirement, formerly obtained by social students, of a few days' interval between the advance notice and the celebration.¹⁹³ A new species of state supervision may be needed to insure to marriage legislation due respect by the state's own officers as well as by other states. The development in foreign countries seems to suggest, however, that a better interstate understanding would not require restrictions on the legislatures, whether they prefer ultraradical or ultraconservative policies.

The chief rule of the civil law countries certainly is in extreme opposition to the American. While codes and treaties are pathetically engaged in trying to conciliate clashing policies of two or more jurisdictions, the American method of simply ignoring the problem by exclusively depending on the law of the place of celebration is so far from the European view that Diena called it "absurd." But, if simplicity indicates a sound law, the American rule is sound, and the European system hopelessly "absurd." Still worse than the complications themselves is the variety of the attempts to harmonize contradictory principles of the national and local laws. The system of applying the personal laws of two parties and the law of the celebration at the same time, if carried through as initiated by the school of Mancini and embodied in innumerable codes, is impractical. A thoroughly informed representative of the Prussian Ministry of Justice told the legal committee of the Diet in 1929 that the difficulties of ascertaining the capacity of foreigners to marry had increased to a disturbing extent after the first world war, strange results were occasioned by exotic religious laws, and that the principle of nationality was far from furnishing the certainty it was supposed to guarantee.¹⁹⁴

A remarkable remedy, however, may be noted. By international conventions, the scope of the requirements that should be observed abroad has been narrowed. Further aid in

¹⁹³ See VERNIER, Suppl. 10 § 16.

¹⁹⁴ See *supra* p. 155, n. 210.

the same direction is supplied by modern enactments, such as the new Italian Code, which spontaneously reduces the causes of nullity of marriage when celebrated abroad. Indeed, if a statute insists on prohibiting marriage between first cousins, which is allowed in most jurisdictions, why should another country yield to this problematic proposition? The state enacting such a statute would do better to limit the prohibition to domestic ceremonies. The Hague Convention, the Treaty of Montevideo, and the *Código Bustamante* agree in the division of domestic marriage impediments into two categories, one of international and the other of merely national applicability. Only the gravest objections, shared by all participant states or raised by one state and understood by the others, are considered sufficient to prevent or nullify a marriage contracted outside of the home state. The lists of internationally relevant impediments so far established coincide in some obvious inclusions—as for instance consanguinity between ascendent and descendent or between brother and sister, or an existing marriage of a party—and in other respects vary in a characteristic manner. The religious impediments that had so great significance for the Hague Convention on Marriage are excluded from consideration in the two Latin American treaties. Under that of Habana (art. 40), any minimum age, including that of eighteen years for male and sixteen years for female parties prescribed in Brazil (C.C. art. 183, XII), must be observed in the other states. The Montevideo Treaty (art. 11) does not oblige a state to respect a lower limit than fourteen years for men and twelve for women. Although this is unsatisfactorily low, the idea of fixing an international age limit is excellent.

Finally, the existing contrasts suggest a compromise on another basis. Suppose Italians visiting the United States. If they are well informed, they may walk right from the pier into a court house and be married at once. The permissibility of their union will be judged exclusively under the law of the

state where they happen to stay during a couple of hours. An American may be domiciled for forty years in Italy, but his capacity to marry at all, or to marry a certain person, will be determined by all Italian authorities concerned, by searching the law of some forgotten home of his or of his father or grandfather. One system is as abusive as the other. A state should not want to join foreigners in marriage utterly disregarding their home laws. Nor should a state, using the dubious test of nationality, exaggerate and perpetuate its significance for the determination of civil status.

When is it reasonable to acknowledge the effect of a change of circumstances upon the substantive requisites of marriage? That the mere presence of parties ought not to suffice to change the applicable law, is recognized, at least in theory. But also the mere, though actual, change of domicile should not be regarded as enough. Evasion will not in practice be eliminated if people who contemplate matrimony may choose their marriage law by simple transfer of their domicile. This is the danger also in making the first matrimonial domicile govern the substantive requisites.

All this leads to the proposition that the personal law of the parties should continue to govern for a certain period after the parties change their domicile. Marrying after this time, they would be subject to the law of the place of celebration alone, with effect also in their home countries. In such a simple system, no additional precaution is needed. If it must be complicated by concessions to the actual conflicts law, the method of shortened lists of international impediments is unavoidable.

CHAPTER 9

Personal Effects of Marriage

I. EFFECTS OF MARRIAGE IN GENERAL

1. The Internal Conceptions

“EFFECTS of marriage” is a modern legal concept corresponding to the comprehensive matrimonial legislation which was developed in the course of the nineteenth century. Following the model of the German and Swiss codes, all recent European codifications of private law contain a chapter concerning the operation of marriage on the relations between the spouses themselves and between the spouses and third persons. The consequences of this arrangement are many and significant; the European doctrine attributes much importance to the fact of marriage and considers many, if not all, the pertinent provisions as a separate complex of rules within the system of law.

At present, the term “effects of marriage” refers both to the personal relations and to the property of husband and wife.¹ The older codifications, compiled at the turn of the eighteenth century, acknowledged certain personal rights and duties of spouses but did not contain any extensive body of rules referring to the operation of marriage on property. They customarily treated the problem of property interests between spouses as it had been approached by the statisticians, that is, by discussing the effects of marriage settlements, at that time customary among propertied classes. Characteristically, today the settlement is still called in France *contrat de mariage* and in German, *Ehevertrag*, although it is not a contract of mar-

¹ “Personal” and “property” relations, of course, as used above, do not exactly correspond to their meanings in private law.

riage but only a contract respecting property relations made upon the occasion of a marriage.

Consequently, these codes and the literature of the period treated the entire question of the effects of marriage on property as a question of contract. In the French Civil Code and codes of other countries influenced by it, the subject is still retained in the sections dealing with contracts. Not until very recent times have some of these countries, particularly Italy, Greece, and Peru, included in their new codes chapters on patrimonial relations between the spouses, chapters placed along with others dealing with the law of family relations. Numerous topics pertaining to the effects of marriage, however, are still dispersed throughout the codes.

American law has not developed in this subject a body of doctrine similar to that of the German Civil Code. The nearest approach to it is a collection of scattered topics connected with marriage, brought together under the heading of "husband and wife" in the various treatises and casebooks on family relations. By analytical comparison, we find an important difference in that marriage in itself does not have so many peculiar consequences in the present private law of this country as it does in Europe. The emancipation of married women, particularly as brought about by the equal rights statutes of the common law states, has reduced the effects of marriage to a comparatively small residuum.

Gradually, married women have been granted the power to own and manage property in their own names and the capacity to make valid contracts with and conveyances to third parties; transactions between husband and wife have been rendered possible; and the peculiar rules on liability for torts committed by a married woman and on the husband's liability for the wife's prenuptial debts abolished. Indeed, in a few states, the old disabilities of married women have been swept away completely.

On the other hand, legislatures and courts of numerous states have deemed it unwise to empower a married woman to bind her property as surety for the debts of her husband or to become his business partner. A considerable number of states have found it necessary to protect creditors by forbidding or restricting property transfers between husband and wife. In several states, the ancient institution of tenancy by the entirety has been preserved. In several states of the Middle West, a contract of a married woman does not bind her assets, unless she expressly states her intention to do so. With respect to torts, the recent family car doctrine has resulted in a revival of the husband's liability for certain torts of his wife. In the field of property interests, statutory rights have been substituted for the ancient rights of dower and curtesy in the majority of states, in many cases with elaborated and strengthened provisions. The effects of marriage upon the property relations of husband and wife, although no longer so vital as they were at common law, are still numerous and important. The changes from the old common law have been so recent, however, so unsystematic, and so different in the various states that no general doctrine has thus far been worked out. Considering the undoctinal or even anti-doctrinal climate of American jurisprudence, we can hardly expect the elaboration of any such doctrine in the near future.

2. Reaction on Conflicts Laws

This is only one of the many differences of structure among the municipal laws, having distinct reactions on the conflicts law. Above all, in the Continental international private laws, the national law has come to govern the whole complex of relations growing out of marriage. Under the German Introductory Law, which has been followed by many other codes, the non-patrimonial rights and duties of married persons are

governed by the national law of the husband as of the time when a particular relation is in question; effects on property of the spouses are governed by the law of the country of which the husband was a national at the time of the marriage.

The American law of conflicts, on the contrary, contains no separate body of rules on effects of marriage. The Restatement perfectly reflects the actual law, when it expresses the "effect" of foreign marriage in one single sentence (§ 133), saying that a state will give it the same effect as "a marriage created by its own law." Duty to pay for necessities, for goods bought, and for alimony are treated together with all other alimentary obligations (§§ 459, 460, 463). Effects on property of the spouses are considered exclusively under the head of interests of husband and wife created in each other's property, either immovable or movable, and are treated along with property in general (§§ 237-38, 248, 289-293). Moreover, the capacity of married persons to enter into antenuptial contracts (§ 238 comment b; § 289 comment c), separation agreements, *et cetera*, is part of the law of contracts (§ 333); the capacity to commit torts, the right of one spouse to sue the other in tort, or the right of the husband to sue a wrongdoer for injury to his wife, are regulated by the law governing torts (§§ 377 ff.). Finally, there are the rules on constructive trusts, living trusts, and testamentary trusts, institutions affording the main safeguards for the family interests of the wealthy.

As we must follow here the European division into two groups of effects, we encounter uncertainty about the borderline between them. Again, no substantial argument supports the theory that the *lex fori*, the distinctions of internal law, should decide directly the scope of a conflicts rule on personal or property effects.² The more important points will have to be discussed one by one.

² Still, this seems to be the prevailing opinion, also adopted in Latin America by authoritative writers, such as 2 VICO, nos. 52, 60.

3. Personal Effects of Marriage

The conflicts rules to be discussed here refer either to the law of the forum, the law of the temporary residence of the spouses, of their domicile, or of their nationality. In order to understand why these rules differ more than those on status in general, we must remember the nature of personal marital relations. Every legislator is conscious of the fact that such duties as those of mutual fidelity, cohabitation, and obedience of the wife, have their foundation in morality or religion. Nobody would think today of enforcing such duties through specific performance or compulsory execution. All modern laws agree that, so long as a marriage is normal, the law has no importance in these respects. Modern codifiers, however, have decided to lay down rules that give these duties a legal character; they wish to emphasize the social importance of sound marriages and to grant a spouse as much judicial help as possible, short of separation and divorce. That it is insufficient to speak of "spiritual effects of marriage," as is done sometimes in Latin America, probably for the sake of Catholic doctrines, is demonstrated by the *Codex Juris Canonici*, which defines the conjugal duties in terms of definite jural rules (c.1110-1113).

The more the legal nature of the mutual duties of a married couple is stressed, the more it is felt possible to resort to a personal law determined either by nationality or marital domicile. Where the personal effects of marriage are governed simply by the law of the directing court, marriage is thought to be ruled essentially by morals, which are naturally evaluated according to local written or unwritten rules. We shall see how both ideas are confused in some countries, for instance, in France.

II. CONTACTS

1. Law of the Residence

The United States. In the United States, it is not quite clear whether purely personal marital relations are governed by the law of the forum or by the law of the place where the spouses "live," although the equation "place where they live, that is, the law of their domicil"³ has probably been abandoned.⁴ As a matter of fact, in case both parties reside temporarily at a place, the court of that place apparently will take jurisdiction and apply the local law.⁵ Probably, the Restatement (§ 133, Comment b) speaks of such a case, stating that "the incidents which result from the existence of the status are determined by the law of the place where they are sought to be exercised," and declares by way of illustration that the law of the place where they presently live determines the question whether a husband is guilty of battery when he uses force to control his wife. Other cases may be too rare to be taken into account. In British countries also, including Quebec,⁶ the conception seems to be that the husband's authority over the person of his wife is of a disciplinary nature and to be decided entirely within the limits of the *lex fori*, jurisdiction being predicated upon residence, not domicil. This rule embraces the questions of what amount of forcible control the husband may use, as well as whether a resident foreigner may apply to the courts for restitution of conjugal rights.⁷

³ MINOR § 79; DUDLEY FIELD art. 554.

⁴ KUHN, Comp. Com. 144. This point is settled implicitly by the Restatement §§ 54, 133.

⁵ Cf. 4 PHILLIMORE 359 cited with approval by 1 WHARTON 365 and KUHN, Comp. Com. 144: "If the husband deserts his wife, refuses her maintenance, or ill-treats her by violence, she has a right *jure gentium* to redress in the tribunals of the place where they reside." Cf. also LORENZEN, 6 Répert. 343 no. 310.

⁶ 1 JOHNSON 327.

⁷ Connelly v. Connelly (1851) 7 Moore P. C. 438; O'Leary v. O'Leary [Alberta, 1923] 1 D. L. R. 949.

Argentina. In Argentina, the test of domicile adopted by the Civil Code (art. 160) and by the Treaty of Montevideo of 1889 (art. 12) was suddenly changed by the Marriage Law of November 12, 1888 (art. 3), which referred to residence; hence the courts have been stimulated to apply the law of the forum.⁸ The literature criticizes this solution as an unjustifiable infringement upon the domiciliary principle.⁹

2. Law of the Domicil

Domicil, as the test chosen for questions of status in general, is decisive also in the personal relations of the spouses in Denmark,¹⁰ Uruguay,¹¹ if not in Argentina, more recently also Peru¹² and Brazil¹³ and under the Treaty of Montevideo.¹⁴ Domicil in this connection is the marital domicil.

In Switzerland, likewise, in accordance with its general rules, married persons domiciled within the country are governed by the municipal law;¹⁵ Swiss nationals domiciled abroad are subject to the law that is considered applicable under the law of conflicts of their domicil.¹⁶

French writers are increasingly inclined to propose legislation that marital domicil be taken as the test.¹⁷

⁸ Even the former text, C. C. art. 160, was understood in the same sense by DAIREAUX, *Clunet* 1886, 293. ALCORTA, 2 *Der. Int. Priv.* 105 explains that in almost every case the law of the place where the conjugal rights and duties are exercised is deemed relevant.

⁹ 2 WEISS-ZEBALLOS, *Manual de derecho internacional privado* (ed. 5, 1912) 159; 2 VICO no. 60; ROMERO DEL PRADO, *Der. Int. Priv.* 281, 285.

¹⁰ Danish Law on Effects of Marriage of March 18, 1925, § 53.

¹¹ No discussion or problem exists as declares VALLADÃO 65.

¹² Peru: C. C. Tit. Prel. art. V, agreeing with precedents for which see 8 APARICIO y SANCHEZ, *Código Civil* 70.

¹³ Brazil: *Lei de Introdução* (1942) art. 7.

¹⁴ Text of 1889, art. 12, text of 1940, art. 14.

¹⁵ NAG. arts. 2, 32, as interpreted by the Fed. Trib. (May 29, 1908) 34 BGE. I 299, 316; cf. STAUFFER, NAG. 77 *Vorbem.* no. 7 to arts. 19ff. The Swiss domiciliary law has been emphatically re-emphasized in BG. (April 18, 1942) 68 BGE. II 9, 13, adding that the rules concerning the protection of the marital union belong to public policy.

¹⁶ NAG. art. 28.

¹⁷ GOULÉ, "Mariage," 9 *Répert.* 89 no. 477.

3. Law of Nationality

The problem. In jurisdictions adopting nationality as the test of status in general, personal husband-wife relations have been controlled by the law of the state of which the husband was a citizen. The simple reason for this rule originally was that in the countries concerned the wife at marriage regularly acquired the nationality of her husband. Yet, although this effect of marriage upon the nationality of the wife has been modified in an increasing number of countries, the conflicts rule has been preserved and is the prevailing rule. This attitude may be explained partly by the force of tradition and partly by the fact that both the wife's acquisition of the husband's nationality and the application of the husband's personal law are founded on the marital power of the husband, which in some rudimentary form still exists under most modern codes.

As a matter of fact, however, the cases where spouses have different nationalities, either during the entire marriage or as a result of later changes, have become frequent and this has had to be taken into account.

In the United States, the law of nationality has been modified several times. Under the provisions in force since 1922, a foreign wife no longer acquires American citizenship by marriage, and an American woman no longer loses her citizenship by marrying a foreigner. These rules also exist in the Soviet Union and in Brazil. French enactments after World War I provided that a French bride retained her nationality unless she filed a declaration to the contrary; an analogous provision is now in force with respect to foreign women marrying Frenchmen. Other countries have followed these models. Along the same line, repatriation of wives who have lost citizenship by marriage is frequently facilitated by reduction of the normal requirements. Another source of different nationalities of husband and wife is that, subsequent to the marriage,

husband or wife may separately acquire new nationalities.

The cases of split nationality were considered by the Hague Convention on Marriage Effects of 1905.

The rule that the national law of the husband governs the personal relations between husband and wife, is expressly upheld in the case of divergent nationalities in the codes of Germany,¹⁸ Italy,¹⁹ the Netherlands,²⁰ Spain²¹ and Iran,²² by the *Código Bustamante*,²³ and the Treaty of Montreux concerning the jurisdictions in Egypt.²⁴ In other countries, the same view still obtains by interpretation.²⁵ Prominent French authorities have also enunciated the rule.²⁶

The rule is unquestionably applied when both parties acquire a new nationality by a common act. This mutability of the applicable law is recognized everywhere (in contrast to the immutability of the rules on marital property relations).

Where the national laws of the spouses are different, the following efforts to modify the rule have been made:

Last common nationality. If the husband alone changes his nationality, which until then has been common to both, it seems inequitable that the wife should suffer a corresponding change in her status. Therefore, the Hague Convention of 1905 (arts. 1 and 9 par. 2) provided that the law of the last nationality common to the spouses should govern. This solu-

¹⁸ EG. art. 14 par. 1, as now usually construed; LEWALD 88; RAAPE 275; WIERUSZOWSKI, 4 Leske-Loewenfeld I 61 n. 352, but see *infra* n. 28; art. 14 par. 2 adds that German law applies also if the husband has lost his German nationality but the wife has retained hers.

¹⁹ Italy: C. C. (1865) Disp. Prel. art. 6; C. C. (1942) Disp. Prel. art. 18.

²⁰ Hof Amsterdam (June 6, 1919) W.10444, N. J. 1032.

²¹ Spain: C. C. arts. 15 and 22.

²² Iran: C. C. art. 963.

²³ Código Bustamante art. 43.

²⁴ Convention of Montreux of May 8, 1937 on Egyptian Mixed Tribunals, Regulations of Judicial Organisation, art. 29 par. 3, U. S. Treaty Series No. 939.

²⁵ See for instance for Austria: WALKER in 1 KLANG'S Kommentar 325 n. 177 and Internationales Privatrecht 742 (doubtful); for Guatemala: MATOS, no. 230; for Portugal: VALLADÃO 70.

²⁶ AUDINET, 11 Recueil 1926 I 212, considers this rule obvious; BARTIN, 2 Principes 214 § 293, sees no room for hesitation.

tion has been followed by Sweden, Poland, Italy, and Greece and has been approved by some writers.²⁷

Illustration: In Germany (RG. [April 15, 1935] 147 RGZ. 385) a Dutch husband acquired German nationality, his wife remaining a Dutch national. His action for restoration of conjugal rights based on German law was denied because this cause of action is unknown to Dutch law, which continued to govern the duties of the parties according to the Hague Convention.

The rule is understood as meaning that a change of nationality, in order to affect both spouses, must be voluntary on the part of both, and not one which is voluntary on the part of the husband alone and extended to the wife merely by operation of law.

But this solution is useful only in the case where there has been at least one common nationality. The Hague Convention is limited to this case; no uniform conflicts rule exists for any other case.

Cumulative application of both national laws. To provide a solution for every case of different nationality, an influential doctrine advocates the application of both national laws cumulatively. Each party, it is argued, may have only those rights and duties that are established by his or her own national law. Hence, what right the husband or wife may exercise depends on simultaneous approval by both marriage laws.²⁸

²⁷ Sweden: Law of June 1, 1912, § 1 subsec. 9; Poland: Law of 1926 on international private law, art. 14; Italy: C. C. (1942) Disp. Prel. art. 18; Greece: C. C. (1940) art. 14 and previously decision of Epheteion Patron (1922) 33 Thémis 92 (Italians, the husband later being naturalized in Greece). OLG. Kiel (Jan. 24, 1931) JW. 1932, 599 (in relation to England, non-member state). Cf. CHAMPCOMMUNAL, Revue 1910, 59; NIBOYET 736 no. 626; 3 ARMINJON 17; POULLET 479 no. 372. Resolution of the Sixth Hague Conference, 1928; Rumanian Draft, art. 23.

²⁸ Finland: Law of Dec. 5, 1929 on family relations of international nature, § 14 par. 1.

Germany: OLG. Braunschweig (Jan. 19, 1913) 26 ROLG. 232; KG. (May 27, 1927) JW. 1928, 73; KG. (Feb. 24, 1936) JW. 1936, 2470; cf. OLG. Stuttgart (March 31, 1905) 11 ROLG. 287. 2 ZITELMANN 670; WALKER 742; M. WOLFF, 4 Rechtsvergl. Handwörterb. 408, but apparently no longer

It is rather generally felt, however, that such a cumulation is difficult to determine and very undesirable. In every country, the law regulating the effects of marriage is drafted to achieve a certain balance; to take out a single part because that part has not been acknowledged by another state's legislation, destroys the consistency of the marital law and reduces its efficacy.²⁹

Emergency solutions. On the basis of the nationality principle, relatively the best solution seems that of resorting to the last common nationality which the parties may have had, as was done by the Hague Convention of 1905. Where the parties never had any common nationality, the best approach seems that of resorting to the law of the husband as of the time of the marriage. This solution was suggested in a draft issued by the Sixth Hague Conference of 1928. Every other solution founded on nationality imposes excessive risks on all third persons who deal with a married person.³⁰

Yet, would it not be preferable to abandon the principle itself, at least in this particular field? A tendency toward the domiciliary law seems strong;³¹ it is of considerable weight

in his IPR. 123; *contra*: 1 BAR § 172 and most writers, see RAAPE 275 (*de-minutio matrimonii*). MASSFELLER, JW. 1936, 2472; ECKSTEIN, 7 Giur. Comp. DIP. 7. The RG. (Feb. 15, 1906) 62 RGZ. 400, has not yet taken sides.

Italy: ANZILOTTI, Corso (1913) 250; *cf.* his arguments as to the parallel problem of paternal relations, 2 Rivista (1907) 116; CAVAGLIERI 219; UDINA, Elementi 181; FEDOZZI 432; BOSCO 229; *contra*: CANSACCHI, 3 Giur. Comp. DIP. 275, with a good summary.

²⁹ J. STRELITZ, Die Schlüsselgewalt im internationalen Privatrecht, Thesis (Göttingen, 1936) 42, tries, without success, to develop a more satisfactory "cumulation." WENGLER, Book Review, 11 Zausl.PR. (1937) 973, calls attention to the rules in French Morocco, under which the status of each spouse is governed by his personal law. 3 FRANKENSTEIN 246 n. 85, suggests applying the law of the defendant.

³⁰ POULLET 479.

³¹ CASSIN, 34 Recueil 1930 IV 757; LEREBOURS-PIGEONNIÈRE 269 no. 239; FEDOZZI 238; *cf.* AUDINET, Clunet 1930, 328. The problem was fully discussed with respect to the capacity of women to contract by AUDINET and others in Travaux du Comité français de droit international privé, Année 4, 1936-37, 89ff. The revised Czechoslovak draft (Revue 1931, 187) § 17 par. 2, refers, in absence of a last common nationality, to the last common domicile of the parties.

in Latin America.³² This development is closely connected with that of resorting to public policy with respect to foreigners domiciled in the forum, a trend which we shall consider in the following section.

4. Public Policy of the Forum

Law of the wife. In a number of countries, the rule that the governing law is the national law of the parties or of the husband, is reversed, and under certain circumstances the law of the wife is applied, at least if it happens to be the law of the forum.

In Germany (EG. art. 14 par. 2), German law is applied when the German husband acquires a foreign nationality and the wife remains a German national.

In France, the case of a French bride marrying a foreign subject but retaining her French nationality has attracted a great deal of attention. While some authors have interpreted the amendment of the nationality laws, under which the French woman's French nationality is preserved,³³ as designed to preserve her French private law rights in all cases,³⁴ others limit the application of French law to couples living in France.³⁵ A similar practice obtained in Brazil under the nationality principle; Brazilian law was applied when one of the parties to the marriage was a national of the country and both, or even the husband alone, were living in Brazil.³⁶ The like seems to be true of other Latin American countries as well.³⁷ An attempt to clarify the situation by an express statu-

³² VALLADÃO has devoted his book, *Conflicto das leis nacionaes dos conjuges nas suas relações de ordam pessoal e economica e no desquite*, to the defense of this tendency. See particularly, 178ff., on earlier views favorable to the law of the domicil and conclusions, 205ff. The Brazilian *Lei de Introdução* of 1942 has followed his doctrine.

³³ Law of Aug. 10, 1927, art. 8.

³⁴ LEREBOURS-PIGEONNIÈRE 390 no. 333; cf. NIBOYET, *Revue* 1929, 193, 194, 209.

³⁵ NIBOYET 734 no. 625.

³⁶ VALLADÃO 136, 200.

³⁷ E.g., Guatemala, MATOS nos. 211, 212.

tory rule was made in France, in 1924, when the Chamber of Deputies voted upon a bill providing for the application of French law in all cases where either the husband is a Frenchman or where, the husband being a foreigner, the wife is a French national and the parties are domiciled in France.³⁸ The requirement of French domicile was dropped in the draft of the *Société d'études législatives* (1930)³⁹: According to this, French law should govern the non-property effects of marriage as to both spouses, if one is French!

French courts. The courts in France go so far in applying domestic law that it has been alleged that they would do so every time a French party is concerned or any French interest is at stake.⁴⁰ However, this does not represent the dominant opinion. For some time, the French courts have been wavering between the two poles of national law and public policy, the former having been strongly advocated by André Weiss and his school, the latter appearing as a goal of nationalistic post-war trends. At present, it seems that certain effects of marriage are regarded as dependent on the national law and others on the domestic law. The catalogue of the latter group, as drawn up by Weiss himself⁴¹ in 1912, has presumably been extended since. In 1928, the following problems were enumerated by Niboyet⁴² as governed by the personal law: capacity or incapacity of the wife; mutual obligations of fidelity and assistance of husband and wife; wife's duty to follow husband to his residence and the right to bear his name; special capacity of the wife to dispose of her salary; "putative marriage."⁴³

³⁸ Revue 1924, 315 n. 1.

³⁹ Bull. Soc. d'Études Lég. 1930, 164, art. 19; cf. *ibid.* 76. Cf. NIBOYET, Revue 1929, 193, 211, BARGIN, 2 Principes 201 § 288.

⁴⁰ Trib. civ. Seine (April 8, 1930) Revue 1930, 461. AUBRY, L'incapacité de la femme mariée en droit international privé français (Paris, 1933) 57, LEREBOURS-PIGEONNIÈRE 389 no. 332, extending public policy to all moral conceptions.

⁴¹ WEISS, 3 Traité 584ff.

⁴² NIBOYET 736 nos. 627, 628.

⁴³ See *infra* p. 545.

The realm where public policy prescribes the exclusive application of French law, was defined as follows: penal provisions; implied authority of one spouse to contract for the other; alimentary obligation; desertion of family.

The same general pattern exists in the other countries following the nationality principle.⁴⁴ So many variations in detail exist, however, that we shall have to discuss every one of the various effects of marriage separately.

Procedural law. It is a traditional proposition that domestic law is exclusively applicable in matters of procedure and penal law. Exclusive domination of the *lex fori* in matters of procedure is recognized by the Hague Convention on Marriage Relations of 1905. After stating as a general principle that the rights and duties of the spouses in their personal relations to each other are governed by their national law, article 1 adds the following proviso:

However, these rights and duties cannot be enforced except by the means permitted under the law of the country where their enforcement is sought.

According to this provision, the forms of action, judgment, and execution are controlled by the local rules of the court,⁴⁵ but the court of the forum does not permit any cause of action that is not also recognized by the national law.⁴⁶ A German husband, for example, is allowed under the German civil and procedural codes to sue his wife for restoration of conjugal rights, but he cannot bring such an action in Belgium. A Belgian husband, on the other hand, may not bring an action of this kind in a German court, since he has no such right of action under his national law.⁴⁷

⁴⁴ Cf. for Spain: TRÍAS DE BES, 31 Recueil 1930 I 677 and 6 Répert. 253 nos. 103, 104.

⁴⁵ See also 1 BAR 481 § 172 par. 3; 2 FIORE 103ff. no. 598.

⁴⁶ The methods of enforcement must be analogous but not identical: see Actes de la Quatrième Conférence de la Haye, 1904, 178, German Denkschrift in 18 Z.int.R. (1908) 580.

⁴⁷ Cf. *infra* n. 50.

This rule, forbidding a country to grant a foreigner a right of action not recognized in his national law, is a strange limitation on local public policy, to which the signatories to the Convention voluntarily submitted. A national of a non-signatory country may well be permitted to avail himself of a local remedy that is not recognized by his national law, when the forum considers the granting of such remedy required by its own public policy.⁴⁸

III. SCOPE OF THE RULES

In this section, we shall note the matters that have been claimed either generally or in some legal system as within the scope of the conflicts rule on personal marital relations.

I. Duties of Conjugal Life

Where the personal law governs the relations between husband and wife, it has been applied to determine the spouses' mutual duties of fidelity and personal assistance, the wife's duties of obedience and rendering services in the household or in the husband's business, and similar matters.

It depends on the personal law⁴⁹ whether the husband may forcibly control his wife's conduct, whether he may open her correspondence or rescind her contractual obligations of personal work, and whether one spouse may sue the other for restitution of conjugal rights.⁵⁰

⁴⁸ See, for instance, for Italy: CAVAGLIERI 218; UDINA, *Elementi* 182 no. 132. It has been contended, however, particularly by 3 FRANKENSTEIN 255, that the public policy of the participant states was modified by the Hague Convention. See this contention in another connection, *supra* p. 279.

⁴⁹ Cf. 2 STREIT-VALLINDAS 350; NIBOYET 737 no. 627 (2).

⁵⁰ Applying the personal law of the parties, German courts have accorded this action (provided for in the German Code of Civ. Proc. § 606) to Czechoslovakian spouses (RG. (June 12, 1922) *Leipz. Z.* 1922, 518) and denied it to Belgians (LG. Giessen (Nov. 1, 1920) 20 *Jahrb. DR.* 221), Swedes (LG. Stuttgart (April 4, 1924) 23 *Jahrb. DR.* 442), and Dutchmen (OLG. Hamburg (Oct. 23, 1934) *IPRspr.* 1934, no. 49; RG. (April 15, 1935) 147 *RGZ.* 385). A peculiar exception has been made by the RG. (Feb. 17, 1936) 150 *RGZ.* 283 (an Italian wife domiciled in Germany was granted this action, unknown to Italian law, because she lacked the remedy she would have enjoyed in Italy).

As already mentioned, the local law is competent, however,⁵¹ to bar an action that does not fit in with the local system or to refuse a method of enforcement not permitted by its procedure; it seems safe to assert also that no forcible control by extrajudicial acts is granted unless permitted by the local law.⁵²

Instead of resorting to the personal law, French courts have sometimes simply applied the domestic law, especially when the court was anxious to compel a husband to support his wife.⁵³ French courts have also enforced the duty of obedience to which a wife is bound under French law, irrespective of whether such duty was incumbent on her under the national law of the spouses.⁵⁴ The *Código Bustamante* seems to abandon the personal law entirely, when it states that the obligation of the spouses to live together, to observe mutual fidelity, and to support each other, is subject to the local law (art. 45).

Domicil by operation of law. A problem deserving special discussion is that of determining the law by which the domicil of a married woman is fixed. The conflicts rule on marital relations determines, as a matter of course, whether a wife is obliged to follow her husband to his place of abode;⁵⁵ but does it also determine whether her domicil necessarily coin-

⁵¹ *Supra* p. 307. Thus, German courts would not assume the task of Swiss judges of admonishing the parties and suspending their life in common, Swiss C. C. arts. 169, 170.

⁵² Only occasionally, the action for restoration of conjugal rights has been classified as of imperative public policy; thus RG. (Oct. 6, 1927) IPRspr. 1926-1927, no. 68 (Soviet Russians).

⁵³ Trib. civ. Seine (May 3, 1879) Clunet 1879, 489; Cour Paris (April 20, 1880) Clunet 1880, 300 (action for goods received at the domicil of the husband); Cour Paris (Jan. 7, 1903) Clunet 1905, 208.

⁵⁴ Trib. civ. d'Evreux (Feb. 15, 1861) D. 1862.3.39 and Trib. civ. Seine (April 8, 1930) Revue 1930, 461. Concerning the latter, see *infra* n. 83.

⁵⁵ Germany: OLG. Braunschweig (Jan. 19, 1913) 26 ROLG. 232 (American wife held obliged to follow her husband from New Jersey to Germany, the law of New Jersey being in accord).

France: Cass. (req.) (June 25, 1923) Clunet 1924, 462 (in the application of German BGB. § 1354 par. 2, it was held that a German wife in Alsace need not follow her husband to an inconvenient dwelling place).

cides with that of her husband? The municipal laws differ widely in answering this question.⁵⁶ While England and Latin America still insist upon the ancient rule that the husband's domicil is necessarily that of his wife, other countries, for instance, Norway and the Soviet Union, do not recognize the wife's domicil as dependent on her husband's at all.⁵⁷

In Germany, prevailing opinion applies the personal law (i.e., the national law of the husband) also to the question whether the wife necessarily shares her husband's domicil.⁵⁸

The United States courts, as well as the Treaty of Montevideo, resolve this question, like all other questions concerning domicil, by resorting to the forum's own rules on domicil, unified throughout the country, instead of referring the problem to the law declared applicable by the forum's choice of law rules. Thus the Restatement says:

"§ 27 . . . a wife has the same domicil as that of her husband."

"§ 28. If a wife lives apart from her husband without being guilty of desertion according to the law of the state which was their domicil at the time of separation, she can have a separate domicil."

Except on the question of desertion, neither the municipal law of the domicil nor that of the forum is decisive.

⁵⁶ E.g., in America the older rule that a deserted wife is domiciled at the new domicil of her husband, has not yet been abolished by the present Treaty of Montevideo on international civil law, text of 1889, art. 8, but is abolished by the new draft of 1940, art. 9. The Restatement § 28, moreover, permits the wife leaving her husband to establish a new domicil if she is not guilty of desertion; statutory law permits the same even if she is guilty.

⁵⁷ Norway: CHRISTIANSEN, 6 *Répert.* 570 no. 72. Russia: FREUND, 4 *Leske-Loewenfeld* I 340.

⁵⁸ Cf. BGB. § 10 and see RAAPE, 2 *D. IPR.* 191; cf. the recent decision of the RG. (Jan. 12, 1939) *HRR.* 1939, no. 376, 159 *RGZ.* 167, on the child's domicil (*infra* p. 605, n. 261).

Contra: 3 FRANKENSTEIN 231, 503.

Similarly, Belgium: Cass. (March 19, 1925) *Pasicrisie* 1925.1.179; Trib. Bruges (March 4, 1936) *Pasicrisie* 1937.3.81. Cf. *infra* Divorce, Chapter 11, n. 71.

A case decided by the *Tribunal civil de la Seine*⁵⁹ involved a citizen of Czarist Russia who had married an American girl from Rhode Island before a civil official in Cyprus. Some time after the marriage, the husband went to Paris, while the wife went to live in Capri, Italy, and never came to France at all. The *Tribunal*, considering the question one of "qualification" and following Bartin's theory on this subject, declared in conformance with the French law of the forum that the domicile of a wife was necessarily that of her husband.⁶⁰

It may be observed, however, that this decision, like many others,⁶¹ was concerned with domicile as a condition of the court's jurisdiction in a lawsuit brought against the wife at the domicile of the husband. In this connection, the local concept of domicile clearly has a better claim than in the choice of law.

In line with the general tendency toward the domiciliary principle, it has even been advocated that the law of the husband's domicile should decide the legal domicile of the wife.⁶²

2. Capacity of Married Persons

Classification. Under the system of personal law, the question has been raised whether a married woman's disabilities are part of the status of the wife, and therefore governed by her own personal law, or rather whether they are part of the specific effects of marriage, and therefore subject to the law governing these effects, which may be the law of the husband,

⁵⁹ Trib. civ. Seine (April 27, 1933) *Revue Crit.* 1935, 759, with note by NIBOYET. Similar cases: Cass. (req.) (June 21, 1865) S.1865.1.313; Cass. (civ.) (March 13, 1933) *Revue Crit.* 1934, 718, *Clunet* 1933, 639; Cass. (civ.) (Dec. 4, 1935) *Revue Crit.* 1937, 189.

⁶⁰ Cf. NIBOYET, *Revue Crit.* 1935, 762.

⁶¹ Cf. e.g., OLG. Stuttgart (May 8, 1908) 17 ROLG. 81, 18 Z.int.R. (1908) 453.

Uruguay: App. Montevideo (about 1938) *Rev. Der. Juris. Adm.* 1938, 210, *Clunet* 1938, 841 (action for separation between American citizens, the husband being domiciled in Uruguay, the wife living in the United States)..

⁶² NIBOYET, 1 *Traité* nos. 541, 554, 571.

that of the common nationality, or some other law. All bias aside, this problem of classification depends on the specific nature of the wife's incapacity. The conflicts rule concerning status in general envisages legal incapacities presumed to inhere in the female sex; the rule concerning personal effects of marriage regards such disabilities as may be imposed in consequence of marriage. The principal illustration was the former article 217 of the French Civil Code: A wife, even when there is no community or in case of separation of property, cannot give, convey, mortgage, or acquire property, either with or without consideration, without her husband's joining in the instrument or his written consent. This rule, imitated in many countries, was abolished in Italy in 1919, in France itself in 1938, and in other countries,⁶³ but is still in force in some other places. The probable motivation of the draftsmen of the Code,⁶⁴ emphasized by modern commentators,⁶⁵ was not a belief in the "frailty of the sex" but a desire to strengthen the leadership of the husband, who was intended to enjoy his powers not only in his own interest but in the interest of the family as a whole. Hence, the provision affects not so much the status of the wife as the organization of the family, i. e., the effects of marriage. An incapacity, such as was imposed by the French Code, should be governed by the conflicts rules on personal effects of marriage rather than by those dealing with personal incapacities.⁶⁶ All these observations

⁶³ Italy: Law no. 1176 of July 17, 1919.

France: Law of Feb. 18, 1938, J. Off. Feb. 19, 1938, 2058 no. 42, also in 39 Bull. Inst. Int. (1938) 145.

Belgium: C. C. arts. 212-226 *bis*, as amended by Law of July 20, 1932.

Rumania: Law of April 19, 1932.

⁶⁴ See HERCHENRODER, "The Capacity of Married Women in French Law," 20 Journ. Comp. Leg. (1938) 197 n. 1.

⁶⁵ COLIN et CAPITANT, 1 Cours élémentaire de droit civil français (ed. 3) 618; NIBOYET 736 no. 627, and prevailing theory.

⁶⁶ Dominant doctrine, see RABEL, 5 Zausl.P.R. (1931) 267; M. WOLFF, 4 Rechtsvergl. Handwörterb. 408; PILLET, 1 Traité 591 no. 277; FEDOZZI 454. *Contra*: 3 FRANKENSTEIN 232, because of his theory, and some of the Swiss decisions because of the confused Swiss legislation.

seem equally true in regard to the common law disabilities of married women. They were never designed for the protection of the wife but were based upon the idea of the merger of personalities and thus flowed from the marriage relationship.⁶⁷ A different characterization of similar incapacities by the municipal law of the forum is irrelevant. It is always possible, of course, that some statute, for instance, that of Florida, although on its face similar to the provision of the French Code, requires a different construction.⁶⁸

Suppose a woman, a citizen of the United States, is married to a Belgian, both being domiciled in England, and she procures a loan in Nice, France, without her husband's consent. A court following the nationality principle (German, Cuban, etc.) will apply neither American law (as of her status) nor the English (as of her domicile) nor the French (as *lex loci actus*) but Belgian law (as governing marital relations).

Where the wife has retained a personal law of her own, the only consistent solution is to disregard this law.⁶⁹

Finally, personal effects of marriage must be distinguished from the effects of marriage on property interests. Numerous disabilities of a spouse as regards freedom of contract or conveyance result from some matrimonial regimes, for instance, from the community property system or the systems according to which the wife's general assets are managed by her husband. Prevailing opinion does not link with personal effects of marriage the limitation of a married woman's capacity, unless it results from the marriage itself irrespective of any matrimonial property regime. The Swiss Federal Tribunal

⁶⁷ See the most recent writer, JOSEPH GINSBURG, "Contractual Liability of Married Women in Nebraska," 20 Neb. L. Rev. (1941) 191, 192.

⁶⁸ In Florida and Texas, the common law disabilities of married women have only partially been removed; cf. 3 VERNIER 36 § 152; in Florida the Circuit Court may grant the wife power "to take charge of and manage her own estate and property," if the court is satisfied as to her capacity to do so, Fla. Statutes Ann. (1943) §§ 62.28-62.31.

⁶⁹ PILLET, 1 Traité 591; LEWALD 95; doubts have been expressed by M. WOLFF, IPR. 124, and RAAPE 289.

formulated this rule once by acknowledging such effects on the personal relations, if these effects take place even where the wife has no property at all.⁷⁰ Thus, the capacity to contract and to acquire property⁷¹ granted to married women by the American equal rights statutes is a general capacity and ought to be respected everywhere as an incident of the marriage law involved insofar as that law is applied at all to the relations between a husband and his wife. Analogous observations apply with respect to limitations on married men.

Married woman's capacity to contract. (a) As a general rule, the personal law is applied everywhere in Europe. This principle has been stated expressly by a recent Finnish statute and seems unchallenged throughout the civil law countries.⁷² It was held in France, for instance, that, in accordance with the foreign law of the time, an English wife was capable of contracting without her husband's consent,⁷³ that an Italian

⁷⁰ BG. (Nov. 21, 1908) 34 BGE. II 738, 742. For an illustration of the double task of examining first the personal capacity in general, then the possible restrictions by matrimonial property law, see the opinion by LYON-CAEN, advocate general, Cour Paris (July 7, 1928) Revue 1929, 81 (Norwegian spouses).

⁷¹ Cf. KG. (Aug. 2, 1934) IPRspr. 1934, no. 44.

⁷² Finland: Law of Dec. 5, 1929 on family relations of international nature, § 14 par. 3, capacity of a married woman to act determined by the law of the state whose citizen she is, except for art. 16, relating to third persons, and the provisions concerning marital property.

France: Cass. (civ.) (Jan. 30, 1854) S.1854.1.270; Cass. (civ.) (July 29, 1901) Clunet 1901, 971; and a great many decisions of the lower courts; see WEISS, 3 Traité 588.

Germany: OLG. Köln (Dec. 5, 1898) Clunet 1905, 396; RG. (Oct. 12, 1905) DJZ. 1905, 1170, Revue 1907, 800 (German wife contracting in Luxemburg, liable under German law); RG. (March 20, 1906) JW. 1907, 328, Clunet 1908, 187.

Italy: Cass. Roma (May 2, 1908) Giur. Ital. 1908, 1, 941, Clunet 1909, 563. Switzerland: The national law of the wife, not the domiciliary law, is decisive; see BG. (Nov. 21, 1908) 34 BGE. II 741, applying Handlungsfähigkeitgesetz (1881) art. 10 par. 2, instead of NAG. arts. 32, 34; BG. (May 23, 1912) 38 BGE. II 3; capacity to contract is governed by the national law: BG. (April 6, 1894) 20 BGE. 648ff, 31 ZBJV. (1895) 173, 4 Z.int.R. (1894) 390 and 5 Z.int.R. (1895) 310; even if she is a former Swiss citizen: BG. (Nov. 21, 1908) 34 BGE. II 738, 742.

⁷³ Trib. civ. Seine (Feb. 10, 1893) Clunet 1893, 530, obviously protecting the French creditors, as the wife had made it clear that she contracted for herself alone, not on behalf of her husband. The same is true for other decisions.

wife could act upon the basis of a general power of attorney from her husband (contrary to French law),⁷⁴ and that a wife from Wallis, Switzerland, needed an authorization of the court in case the husband was interested in the transaction.⁷⁵

The capacity of married women under age to contract depends on whether, under the marital law, any powers are reserved to her father or guardian.⁷⁶

(b) The law of the forum is seldom resorted to in this matter.⁷⁷

(c) The law of the place of contracting is applied nowhere but in the United States and, perhaps as to mercantile contracts, in England.⁷⁸

Capacity to sue and be sued. A woman's capacity to be a party to a lawsuit (*persona standi in iudicio, capacité d'ester en justice*) is generally held to depend upon the personal law,⁷⁹ except in the United States, where it is determined by the law of the forum (Restatement § 588).

The public policy of the forum has hardly ever been advanced to eliminate the personal law.⁸⁰

⁷⁴ Trib. civ. Seine (Aug. 5, 1881) Clunet 1882, 617; conf'd Cour Paris (Dec. 17, 1883) Clunet 1884, 289; Trib. civ. Tunis (Jan. 29, 1908) Clunet 1909, 745.

⁷⁵ Cour Chambéry (Jan. 9, 1884) Clunet 1885, 180; Trib. comm. Seine (May 10, 1886) Clunet 1887, 183; App. Chambéry (Jan. 29, 1934) Revue Crit. 1935, 133 (Swiss wife needed authorization under Swiss C. C. art. 177). Correspondingly, Cour civ. Genève (Nov. 17, 1933) 56 Sem. Jud. (1934) 572 (French wife in Switzerland under French law).

⁷⁶ RG. (Jan. 10, 1918) 91 RGZ. 403.

⁷⁷ France: PILLET, 1 Traité 588 no. 276; LEREBOURS-PIGEONNIÈRE 389 no. 332; *contra*: GOULÉ, "Femme mariée," 8 Répert. 388 nos. 16, 17.

⁷⁸ CHESHIRE 238, advocating the proper law; *cf. supra* pp. 190, 191.

⁷⁹ France: WEISS, 3 Traité 589 n. 1, cites six French decisions and three of Egyptian Mixed Tribunals.

Germany: never doubted.

The Netherlands: Rb. den Haag (June 24, 1919) W.10566 (Italian law); Hof Amsterdam (July 13, 1923) W.11163, N. J. 1924, 118 (Swiss law); Rb. Amsterdam (March 17, 1930) W.12151 and Rb. Arnhem (Jan. 23, 1933) W.12710, first point (German law) and others.

Spain: Trib. Supr. (Jan. 13, 1885) 57 Sent. 45, Clunet 1888, 138, *cf.* Clunet 1889, 771 (wife, party to a lawsuit in Cuba, on the ground of her capacity under the law of the United States).

⁸⁰ One case is known: App. Gand (Dec. 24, 1902) Clunet 1903, 980, criticized by STOCQUART, *ibid.* 977.

Right of the wife to carry on a business or engage in a profession. (a) Whether a wife needs the consent of her husband to accept employment or to carry on an independent business of her own, is decided according to the law that governs her personal relations. For instance, an Italian wife who had engaged in a profession in French Tunisia, was held to have done so with her husband's consent, which was presumed to exist under article 13 of the Italian Commercial Code, as worded at that time.⁸¹ The rule includes the conditions for a wife's carrying on a business as a "sole trader."⁸²

The *Tribunal civil de la Seine*, however, consistently following its tendency to apply French law whenever possible, awarded damages of 50,000 francs to an American husband, domiciled in Chicago, Illinois, against the managers of a theater in Paris who had employed his French wife, a former music hall diva, against his prohibition.⁸³ It would be intolerable, the court said, if the wife could publicly challenge in France the authority of her husband, even when he is a foreign subject. The right of a French husband to forbid his wife to engage in separate professional activity has been preserved by the reform act of 1938, which, however, subjects the exercise of this right to the approval of the courts.⁸⁴

(b) The law of the forum simply is applied in the United States.

Prohibition of certain transactions with third persons. In former times, a married woman was often forbidden to become a surety or to pledge or mortgage her separate property for her husband or other persons; her power to do so is still limited or denied in some states of the United States.⁸⁵ In the Swiss

⁸¹ Trib. civ. Tunis (March 28, 1908) *Revue* 1909, 227.

⁸² Cf. the American statutes collected by 3 VERNIER § 187 and for Europe, HARTENSTEIN, "Handelsfrau," in 4 *Rechtsvergl. Handwörterb.* 156, on conflicts law *ibid.* 161.

⁸³ Trib. civ. Seine (April 8, 1930) *Revue* 1930, 461.

⁸⁴ Law of Feb. 18, 1938. See *supra* p. 312, n. 63.

⁸⁵ Alabama, Georgia, Kentucky, Michigan, New Hampshire, Pennsylvania. The New Hampshire statute was construed as protecting only married women

Civil Code (art. 177 par. 3), the authorization of the court of the domicil is required for any obligation to third persons undertaken by a wife for her husband. This restriction would be applied in a German court,⁸⁶ and it has been urged that a German court should grant such authorization if the wife has her domicil in Germany.⁸⁷

Another prohibition established in Portugal and Brazil⁸⁸ provides that a husband may not without the consent of his wife (*outorga uxória*) alienate immovables, sue or be sued (*sic*) in regard to immovables, make gifts, or (by Brazilian law) become a surety. This prohibition is expressly stated to apply irrespective of the property regime and thus comes under the heading of personal relations in all courts applying the personal law. The Brazilian courts, however, by their broad extension of public policy, have applied the prohibition also in the case of a foreigner married to a Brazilian wife⁸⁹ and will probably continue to do so under their new law, in the case of Brazilian domicil of either party.

Protection of third persons. Restrictions of the kind described above are usually meant to apply also to relations between the spouses and third parties. If, however, foreign restrictions are to be upheld, the conflicts rule may well make an exception in the case of a third person dealing in good faith

domiciled in New Hampshire; see Proctor v. Frost (1938) 89 N. H. 304, 197 Atl. 813, and Note, 51 Harv. L. Rev. (1938) 1444. On Nebraska see 3 VERNIER 315 n. 9. The Roman-Dutch law imposing restrictions on a married woman binding herself or her property, was considered a rule of capacity, governed with respect to immovables by the *lex situs*, in Bank of Africa Ltd. v. Cohen [1909] 2 Ch. 129, cf. CHESHIRE 541; also UNGER, "The Place of Classification in Private International Law," 19 Bell Yard (1937) 3, 14.

⁸⁶ For France see WEISS, 3 Traité 590, 591, but he admits two decisions of 1831 and 1833 applying the *lex fori*, *ibid.* n. 5.

⁸⁷ RAAPE 287ff.

⁸⁸ Portugal: C. C. arts. 1119, 1191, 1471. Brazil: C. C. art. 235; cf. BEVIL-AQUA, 2 Código Civil (ed. 5, 1937) 115. The husband's acting without the wife's consent is prevailingly held to be annulable rather than void; see on the controversy in Brazil GUIMARÃES, Accordãos, 3 suplemento (1939) 476.

⁸⁹ See Sup. Trib. Fed. (Nov. 30, 1932), not published, see VALLADÃO 124, reported by RODRIGO OCTAVIO, Dicionário no. 986; Sup. Trib. Fed. (May 24, 1929) 10 Rev. Jur. Bras. (1931) 353; for decisions of São Paulo, see VALLADÃO 132.

with one of the spouses. The German Code, although containing two clauses for the protection of domestic commerce (EG. arts. 7, par. 3 and 16, par. 2), does not cover the prohibitions discussed here, but analogous application of these clauses has been advocated.⁹⁰ In France, Brazil, and other countries, the vague and omnipresent force of public policy is invoked whenever domestic creditors are endangered by the application of a foreign law.

3. Implied Authority: Legal Transactions Between Husband and Wife

Power to obligate the other spouse. By virtue of her "power of the keys," so denominated in the German doctrine as a power granted *ex lege*, the wife is authorized to bind her husband by contracting within the sphere of household activities (BGB. § 1357). The French courts have gradually been reaching similar results on the basis of an alleged implied authorization (*mandat tacite*) by the husband, the presumed contractual basis thereof becoming more and more fictitious.⁹¹ Most countries have rules of either the German or the French type, which are sufficiently different from each other, however, to cause problems in conflict of laws. The prevailing view holds that all these regulations are concerned with the personal relations between husband and wife, rather than their property relations.⁹²

Of the same character are the various rules concerning liability for household expenses, such as the American family expense statutes,⁹³ the corresponding provisions in Switzer-

⁹⁰ See RAAPE, 2 D. IPR. 199 and citations.

⁹¹ KARL TH. KIPP, *Rechtsvergleichende Studien zur Lehre von der Schlüsselgewalt in den romanischen Rechten* (Berlin, 1928). Nothing was changed by the reforms of 1938; cf. Note by VIALLETON in Sirey 1938.1.176, 179.

⁹² See NIEMEYER, *Das IPR. des BGB.* 144 and the authors cited by RABEL, 5 Zausl.PR. (1931) 283; J. STRELITZ, *Die Schlüsselgewalt in internationalen Privatrecht*, Thesis (Göttingen, 1936). To the same effect in Switzerland, STAUFFER, NAG. 79 no. 9.

⁹³ 3 VERNIER 102 § 160.

land,⁹⁴ Argentina, Brazil, Cuba, Scandinavia, Guatemala, and other countries,⁹⁵ which declare both husband and wife liable for certain acts of the wife, and finally those occasional rules which impose upon the wife liability for certain deeds of her husband.

Not only in Germany is the personal law applied with respect to all these rules,⁹⁶ but also in America the courts are in agreement on this point. In *Paquin Ltd. v. Westerfelt*,⁹⁷ the family expense statute of Connecticut was applied by the Connecticut court to spouses domiciled in that state, while in *Mandell Brothers v. Fogg*,⁹⁸ the Massachusetts court did not apply the statute of Illinois, making the property of both spouses jointly and severally liable for expenses of the family, as against a wife whose husband had bought goods in Chicago, both being citizens of Massachusetts. This latter case illustrates a disregard for the seller of the goods, typical of any consistent resort to the principle of personal law.

German law is less rigorous. The German code has established an exception to the rule that the law of the husband governs the relations between husband and wife; German law applies if the spouses are domiciled in Germany and the German law is "more favorable" to the third party with whom a transaction has been made (EG., art. 16 par. 2). The awkward form of this sound exception has been properly criticized.⁹⁹

French courts, on the contrary, have been said simply to apply the law of the forum.¹⁰⁰ What they actually did in a series

⁹⁴ Swiss C. C. arts. 207 par. 2, 220 par. 2, 243 par. 3; cf. *ibid.* arts. 163, 206.

⁹⁵ See KIPP, *op. cit. supra* n. 91, at 17; KADEN, 6 Rechtsvergl. Handwörterb. 205 2 b(a).

⁹⁶ Unanimous opinion. The application of the Hague Convention of 1905 is controversial; cf. WIERUSZOWSKI, 4 Leske-Loewenfeld I 63 n. 365 and *contra*: 3 FRANKENSTEIN 240.

⁹⁷ *Paquin, Ltd. v. Westerfelt* (1919) 93 Conn. 513, 106 Atl. 766.

⁹⁸ *Mandell Brothers v. Fogg* (1903) 182 Mass. 582, 66 N. E. 198.

⁹⁹ See comment by RAAPE 359.

¹⁰⁰ PILLET, 1 *Traité* 588 no. 276; BARTIN, 2 *Principes* 242 § 300, and others with regret, as they advocated the national law; NIBOYET 739 no. 628 (2).

of cases was to allow fashionable Paris dressmakers to sue the husbands of lady customers on the theory that the debt was within the rather modest scope of those household expenses usually allowed on the ground of *mandat tacite*.¹⁰¹ In no case would the national law of the husband have been more advantageous to the plaintiff; ordinarily the spouses were found to have been domiciled in France at the time of both the order and the delivery of the goods. Since the allocation of the debt as between husband and wife was not in question, the result seems not very different from the German rule.

The failure of the American conflicts rule to accept the creditor's claim as defined under his own law, compels him, before contracting, either to investigate where the spouses are domiciled and what law is in effect there or to ask both spouses expressly to consent. The elimination of that necessity is the precise purpose of the family expense laws.

The best solution, so far not in force anywhere, would be to hold either spouse liable or free from liability, according to the personal law governing the non-patrimonial relations between the spouses and, further, to grant the plaintiff the possibility of availing himself of any more advantageous position that he may have under the "proper law of the contract."

Prohibited transactions between husband and wife. A few vestiges of the ancient notion that marriage effects a merger of the wife's personality with that of her husband and that husband and wife represent a single unity of body and soul, have survived to the present day. In several states of the United States,¹⁰² husband and wife either cannot contract with each

¹⁰¹ Worth c. Rimsky-Korsakoff, Trib. civ. Seine (March 30, 1893) Clunet 1893, 868; Cour Paris (June 17, 1899) Clunet 1900, 138; Trib. civ. Seine (June 9, 1905) Clunet 1905, 1040; Beer c. Prince Kotschoubey, Trib. civ. Seine (April 10, 1907) conf'd Cour Paris (Nov. 5, 1907) Clunet 1908, 478; Beer c. Prince Yourewsky, Trib. civ. Seine (June 17, 1908) Clunet 1909, 476 (denying liability of husband); Redfern c. the same defendant, Trib. civ. Seine (July 13, 1911) Revue 1912, 385; Cour Paris (April 18, 1929) Revue Crit. 1935, 149 (English spouses living in France; the husband is not allowed to entrench himself behind the English system of property separation).

¹⁰² 3 VERNIER §§ 156, 173.

other at all or are unable to make certain transactions with each other, for instance, to form a partnership, to transfer immovables, or to make a sale to each other.¹⁰³ The French courts, though they cannot carry the principle through, regard partnerships between spouses as null.¹⁰⁴ In European conflict of laws, the personal law clearly seems to govern the application of such provisions.¹⁰⁵

Widely discussed, however, are the choice of law problems arising from the prohibition of gifts between husband and wife. The controversy originated in the days of the postglossators, when Baldus and Bartolus disagreed on whether the Roman prohibition of *donationes inter virum et uxorem* was a *statutum reale* or a *statutum personale*.¹⁰⁶ Most codes have abandoned such prohibitions, but, under some legislations, gifts made during coverture are still invalid¹⁰⁷ or revocable.¹⁰⁸ According to prevailing opinion, these rules are within the scope of the personal effects of marriage.¹⁰⁹ Hence

¹⁰³ For sales, see also France: C. C. art. 1595.

The Netherlands: BW. art. 1503, and others.

¹⁰⁴ See LAGARDE, 1 *Revue générale de droit commercial* (1938) 175; since the alleged prohibition is based on the matrimonial law, Cass. (civ.) (July 3, 1917) S.1921.1.201, it is applied to French spouses trading in Italy, App. Lyon (April 24, 1929) S.1931.2.25 (refusing in consequence enforcement to an Italian decree treating the wife as a merchant and, hence, declaring her bankrupt).

¹⁰⁵ France: Cass. (req.) (Jan. 25, 1938) D.H. 1938. 164 ff. (sale between the spouses valid under Mohammedan law, despite French C. C. art. 1595).

The Netherlands: H.R. (May 17, 1929) W.12006, N.J. 1929, 1279 (sale between German spouses of Dutch immovables, subject to German marital law rather than to Dutch BW. art. 1503). Similarly Louisiana: Rush et al. v. Landers (1902) 107 La. 549, 32 So. 95; Note, 57 L.R.A. 353 applies art. 2446 La. C. C., to an immovable, the spouses being domiciled in Indiana.

¹⁰⁶ Cf. WEISS, 3 *Traité* 592 n. 1; AUDINET, 5 *Répert.* 668 nos. 226ff.

¹⁰⁷ Italy: C. C. (1865) art. 1054; the Netherlands: BW. art. 1715; Spain: C. C. art. 1334.

¹⁰⁸ France: C. C. art. 1096; Portugal: C. C. arts. 1178, 1181.

¹⁰⁹ Belgium: POULLET 609 no. 468 n. 2.

France: WEISS, 3 *Traité* 592; BARTIN, 2 *Principes* 213 § 292; App. Caen (Jan. 15, 1912) *Revue* 1914, 147; Cass. (req.) (March 15, 1933) S.1934.1.393.

Germany: RG. (March 2, 1894) 4 *Z.int.R.* (1894) 351; RG. (Oct. 11, 1907) 19 *Z.int.R.* (1909) 222, and the general opinion of writers.

Greece: STREIT-VALLINDAS 350 n. 36.

Spain: See DE CASTRO, "La cuestión de las calificaciones en el Derecho internacional privado," 20 *Revista Der. Priv.* (1933) 265 at 278 n. 167, refuting the argumentation by RAAPE 341 II 3 as to Spanish law.

the personal law applied is that of the lucrative transaction, irrespective of the time element considered determinative in marital property relations.¹¹⁰ To resolve the uncertainties in the case where the spouses have different nationalities,¹¹¹ the Polish statute expressly invokes the national law of the husband at the time of the contract.¹¹²

The French courts exclude immovables, at least immovables situated in France, from the rule and apply French law as the law of the situs.¹¹³

Other classifications have been occasionally preferred. The Dutch Supreme Court,¹¹⁴ for instance, once held that the Dutch prohibition, although affecting Dutch public policy, did not apply to German spouses because the prohibition was said to be inseparably connected with the prohibition of postnuptial marriage settlements, established in the Dutch legislation and Latin Codes, but unknown to the German Code.

As respects provisions excluding lawsuits between husband and wife, the American rule that the law of the forum¹¹⁵ or, in the case of an action in tort, the law of the place of the wrong¹¹⁶ should be applied, is not shared by other countries;

¹¹⁰ KG. (March 20, 1939) Dt. Recht 1939, 938 (supposing that the husband was of Greek nationality at the time of the marriage, a certain contract made by him, in view of the Greek matrimonial system of separate property, constituted a donation; since he certainly was a Greek at the time of the contract, a donation, if any, was void under Greek law, applicable as governing *personal* relations. The court did not, as a Note by REU believes, characterize donation under *lex fori* or *lex causae*, but simply applied the historic conceptions common to all nations concerned).

¹¹¹ See, besides the general discussion, *supra* p. 301, AUDINET, 5 Répert. 669 nos. 236, 242ff.

¹¹² Poland: Law of 1926 on international private law, art. 15.

Germany: Erster Gebhardscher Entwurf (1881) § 19 par. 3.

¹¹³ Cass. (civ.) (April 2, 1884) Clunet 1885, 77; Trib. civ. Seine (March 3, 1891) Clunet 1891, 508, modified by Cour Paris (May 27, 1892) Clunet 1892, 940, S.1896.2.73, conf'd Cass. (req.) (May 8, 1894) Clunet 1894, 562, D.1894.1.355; Cour Paris (March 5, 1901) Clunet 1901, 775; Cass. (req.) (May 7, 1924) Revue 1924, 407. BARTIN, 2 Principes 215, 216, hopes this singular treatment of immovables is transitory.

¹¹⁴ H.R. (May 17, 1929) W. 12006.

¹¹⁵ Restatement § 133 implicitly.

¹¹⁶ Critical STUMBERG 186.

such prohibitions are regarded merely as means of regulating the marriage relation and preserving domestic harmony. Recent American writers have urged a corresponding application of the personal law.¹¹⁷

Of the same character are laws that do not permit a husband or wife to levy execution upon the property of the other spouse. The Swiss law contains peculiar provisions of this kind, which the Swiss Federal Tribunal has repeatedly declared to be no part of public policy and therefore not applicable to the case of a husband domiciled abroad.¹¹⁸

Finally, the personal law governing marital effects extends to the problem whether spouses during coverture may make agreements on such matters as alimony (without or until judicial separation), residence, or education of children. In modern times, more and more freedom of arrangement has been allowed, but the laws differ considerably. The French courts, vigorously insisting on their domestic restrictions of such agreements, are concerned almost exclusively with examining whether these restrictions have been observed.¹¹⁹

Particular difficulties arise in the case of financial agreements preceding separation or divorce.¹²⁰

¹¹⁷ STUMBERG 186; HANCOCK, *Torts in the Conflict of Laws* 235; *cf.* as to vicarious liability of the husband, *ibid.* 255.

¹¹⁸ BG. (March 31, 1927) 53 BGE. III 33, 37; BG. (Oct. 10, 1930) 56 BGE. III 173; *contra*: BG. (Sept. 5, 1916) 42 BGE. III 342, 348.

¹¹⁹ Cour Paris (April 29, 1913) *Revue* 1913, 879; Trib. civ. Seine (June 18, 1934) *Clunet* 1935, 619, *Revue Crit.* 1935, 125, criticized by BATIFFOL, *Revue Crit.* 1937, 429, for not having inquired into the national (German) law of the spouses; App. Lyon (March 26, 1934) *Revue* 1935, 461; Cass. (civ.) (Jan. 26, 1938) D.H. 1938.197, and Cour Dijon (March 28, 1939) *Clunet* 1939, 634, neglect the analogous Italian marital law because the agreement was valid under French law.

¹²⁰ E.g., a Swiss author, ADRIAN, (according to the review of his book in 38 SJZ. (1942), 371) admonishes Swiss lawyers to be aware in the case of English parties, of the hostility of English law to agreements whereby a spouse promises financial advantages to the other for obtaining divorce, while Swiss C. C. art. 158 allows agreements as to the consequences of divorce or separation with allowance of the divorce court. See moreover, *infra*, pp. 525, 531.

4. Support ¹²¹

Application of the matrimonial law. The husband's duty to support his wife or, more generally, one spouse's duty to support the other is considered in civil law countries as one of the principal incidents of marriage,¹²² rather than a quasi-contractual obligation as conceived under an earlier doctrine.¹²³

German courts and writers are in almost unanimous agreement that the national law of the husband, being the law governing the marital relation, applies to all questions pertaining to the conditions and kind of support to be rendered, either within the common household or during an extrajudicial separation. The only exception to this principle, according to German decisions, is that marital property rules govern the determination of what property is liable to furnish the means of support.¹²⁴

French courts have often been said to follow the law of the forum, but they too start with the application of the national law.¹²⁵ They think, however, that the French rules on alimony present a minimum standard which must be applied on the ground of public policy.¹²⁶ This modification has been rejected

¹²¹ On comparative law and international enforcement see International Institute for the Unification of Private Law, *L'Exécution à l'étranger des obligations alimentaires* (Rome, 1938); "L'abandon de famille et ses sanctions," in *Travaux de la semaine internationale de droit* (Paris, 1937).

¹²² ROGUIN, *Traité de droit civil comparé, Le Mariage* (1904) 198 ff. nos. 147, 148; Swiss BG. (May 29, 1908) 34 BGE. I 299, 313; revised Czechoslovakian draft of Private International Law, § 17 par. 1, in *Revue* 1931, 189.

¹²³ 1 BAR § 203.

¹²⁴ RG. (Feb. 15, 1906) 62 RGZ. 400, 16 Z.int.R. (1906) 298, 20 Z.int.R. (1910) 404, Clunet 1911, 946; Bay. OBLG. (March 3, 1913) 30 ROLG. 165; 3 FRANKENSTEIN 260 n. 135; KG. (Feb. 9, 1929) IPRspr. 1929, no. 15; KG. 1929, no. 15; KG. (March 9, 1931) IPRspr. 1931, no. 66.

¹²⁵ Cour Paris (Oct. 30, 1926) *Gaz. Pal.* 1927.1.284; NIBOYET 739 no. 628 (3).

¹²⁶ Cass. (req.) (July 22, 1903) Clunet 1904, 355; Cass. (req.) (March 27, 1922) S.1923.1.27, Clunet 1922, 115, *Revue* 1924, 401. For many other decisions see WEISS, 3 *Traité* 597 n. 2. Spanish Trib. Supr. (July 1, 1897) 82 Sent. 18 declares that a foreign married woman is to be protected, if in Spain.

by most German authorities,¹²⁷ although it might well be advocated in cases where a foreign married person is left stranded in the forum and has become a public charge, because his personal law fails to grant him a right to support by his spouse under the circumstances. The English and American rules on alimony and support in particular are usually construed so as to exclude their application by a foreign court; the *lex fori* is, then, the only possible resort to secure support for an indigent foreigner.

Switzerland applies the general rules on marital effects according to which foreigners domiciled in Switzerland are subject to Swiss law.¹²⁸

According to section 459 of the Restatement, the duty imposed by the state of the domicile to pay for necessities furnished to a husband, wife, or minor child is enforced in every state. To this extent the personal law of the parties has extra-territorial effect. The Restatement also recognizes an obligation imposed by the state where the necessities have been furnished, but only if this state has jurisdiction over the debtor.

Lex fori. Simple application of the *lex fori* to the duty of support has been adopted in the United States¹²⁹ as well as by the *Código Bustamante*.¹³⁰

¹²⁷ RG. (Feb. 15, 1906) 62 RGZ. 400, cited *supra* n. 124; 1 BAR § 203 n. 2: "arbitrary." LEWALD 91 no. 126; RAAPE 284; 3 FRANKENSTEIN 261, emphasizing the force of the Hague Convention on effects of marriage. *Contra*: KIPP-WOLFF, Familienrecht 144 § 39B; NUSSBAUM, D. IPR. 147, in the case where both spouses reside permanently in Germany, or one spouse with the consent of the other, in view of the administrative and criminal importance of the duty.

¹²⁸ BG. (May 29, 1908) 34 BGE. I 299, 316ff; BG. (Feb. 22, 1934) 60 BGE. II 77 (leaving undecided the case where only the defendant lives in Switzerland); BG. (April 18, 1942) 68 BGE. II 9, 13.

¹²⁹ Restatement § 458.

¹³⁰ Código Bustamante art. 45. It is recognized in community property states that the obligation to pay for necessities arises out of the marriage and not out of the wife's partnership in the community fund. See DAGGETT, Legal Essays on Family Law (1935) 116 for California, 123 for Louisiana, 134 for Texas, 144 for Washington.

Law of the debtor. A theory presented by Pillet¹³¹ and adopted by the Japanese statute¹³² subjects duties of support to the law of the debtor, but it is doubtful whether this rule is meant to apply to marital duties of support.

Provisional decrees. If the personal law governs, it does so until the marriage is dissolved or some special rule applies. The personal law is not supplanted even on the commencement of an action for annulment, for limited or full divorce, or for judicial separation; however, the procedural situation may give rise to particular needs.¹³³

A few German decisions have assumed that a court, taking cognizance of an action for divorce or some similar action, could by interlocutory decree grant the wife alimony *pendente lite*, irrespective of the foreign personal law governing the marital status of the parties.¹³⁴ More recent decisions, however, no longer resort to the German law of the forum even in an interlocutory decree unless the personal law cannot be readily ascertained;¹³⁵ sometimes it is presumed that the foreign rule is identical with that of the forum.¹³⁶

5. Wife's lien¹³⁷

Article 2121 of the French Civil Code grants any married

¹³¹ PILLET, 1 *Traité* 599 and *Droit international privé, résumé du cours* (Paris 1904-1905).

¹³² Japan: Law of 1898, art. 21.

The similar Swiss provision, NAG. art. 9 par. 2, has no reference to foreigners; cf. STAUFFER, NAG. art. 9 no. 7.

¹³³ See also *infra* pp. 526-529.

¹³⁴ OLG. Hamburg (Dec. 7, 1911) *Hans. G. Z.* 1912 Beibl. 56 no. 28 II; OLG. Hamburg (April 28, 1921) 76 *Seuff. Arch.* 242 no. 149, OLG. München (Nov. 4, 1921) JW. 1921, 1465, OLG. Köln (Dec. 14, 1928) JW. 1929, 449; OLG. Hamm (Sept. 22, 1932) JW. 1932, 3824, IPRspr. 1932, no. 87. This practice was approved by LEWALD 91 no. 126 (b); NUSSBAUM, D. IPR 147 n. 3; JONAS, JW. 1936, 3578. It does not refer to alimony between spouses in general, as an American writer understood.

¹³⁵ The constant practice of the 13th Senate of the Kammergericht (March 9, 1931 and Oct. 22, 1931) IPRspr. 1931, nos. 66, 67; (Dec. 19, 1932) IPRspr. 1932, no. 88; (May 25, 1936) JW. 1936, 3577, 7 *Giur. Comp. DIP.* no. 33; RAAPE 284; cf. also WIERUSZOWSKI, 4 *Leske-Loewenfeld* I 62 n. 359.

¹³⁶ LG. Mainz (Sept. 2, 1925) JW. 1925, 2163; 3 FRANKENSTEIN 262.

¹³⁷ CHARRON, "L'Hypothèque légale de la femme étrangère," *Nouv. Revue* 1937, 29; Note, *ibid.* 1938, 124.

woman, irrespective of her property regime, a general lien on all her husband's land for the protection of claims which she may have against her husband, particularly claims arising from his management of her property. Prevailing opinion in France categorizes provisions of this sort despite their pecuniary character among personal effects of marriage.¹³⁸ In recent years, however, French courts have refused to recognize a wife's lien on French immovables when the wife is neither a French national nor enjoys treaty rights, even though her national law imposes a lien on her husband's immovables.¹³⁹

The theory that the wife's lien is the counterpart of the disabilities of a married woman has been invoked to justify the first theory.¹⁴⁰ This argument cannot be correct, as the wife's lien was not abolished in France¹⁴¹ when full legal capacity was granted to married women by the law of February 18, 1938. On the other hand, the courts transplant the problem into the field of the rights of aliens where it does not belong. The personal law should govern the problem simply as an incident of the marriage relationship.

¹³⁸ Trib. Havre (Dec. 29, 1928) Clunet 1929, 1048. WEISS, 3 Traité 649; PILLET, 1 Traité 593ff. no. 278; NIBOYET 741 no. 630; LEREBOURS-PIGEONNIÈRE 428 no. 354, on an earlier practice see *infra* p. 336, n. 15.

¹³⁹ Cass. (req.) (Jan. 27, 1903) S.1904.1.81; Trib. civ. Seine (Dec. 31, 1910) Revue 1911, 369, Clunet 1911, 901; App. Aix (Jan. 20, 1938) Clunet 1938, 488, Nouv. Revue 1938, 122.

¹⁴⁰ See PILLET and NIBOYET, *loc. cit. supra* n. 138, CALEB, 4 Répert. 196 no. 176 and authors cited.

¹⁴¹ C. C. art. 2135, modified by Décret of June 14, 1938, allowing the wife, however, to waive her *hypothèque légale*.

CHAPTER 10

Effects of Marriage on Property¹

I. BASIC CONCEPTIONS

CORRESPONDING to far-reaching differences in the main conceptions of marital property systems, the conflicts rules on this subject are split into three groups, two of which are illustrated by the American conflicts rules on marital property rights in (1) immovables and (2) movables, and the third by the European rules on marital property rights.

1. American Rules on Immovables

The old rule on immovables,² which is preserved in this country, applies the *lex situs*. The underlying idea is that an immovable is considered an isolated object of rights. This idea can be traced back to ancient Germanic laws and was characteristic of the feudal system of landholding. If a woman owned land at the time of marriage, the interest acquired by her husband through the marriage was determined by the law of

¹ On the American conflicts law see STUMBERG, "Marital Property and the Conflict of Laws," 11 Tex. L. Rev. (1932) 53; LEFLAR, "Community Property and Conflict of Laws," 21 Cal. L. Rev. (1933) 221; HOROWITZ, "Conflict of Law Problems in Community Property," 11 Wash. L. Rev. (1936) 121, 212; NEUNER, "Marital Property and the Conflict of Laws," 5 La. L. Rev. (1943) 167. For comparative conflicts law: JULIA JOELSON, *Güterrechtliche Wirkungen der Ehe bei verschiedener Staatsangehörigkeit der Ehegatten im internationalen Privatrecht* (Heidelberg, 1933).

² *Immobilia reguntur lege loci*. STORY §§ 158, 186, 188; 4 PHILLIMORE no. 476; WHARTON 405 § 191. D'ARGENTRÉ originated this doctrine in polemics (*Commentarii in Patrias Britonum Leges*, art. 218, gl. 6, § 34) opposing DUMOULIN's theory of domicile (*consilium* 53) in case no matrimonial convention was made. The doctrine was advocated in the Netherlands and in France by Paul Voet and Froland, from whom Story took inspiration. The problem was called the "most famous question" in a decision of the Court of Dutch Brabant of November 3, 1693, "*Decisio brabantina super famosissima questione*." See FROLAND, 1 *Mémoires concernant la nature et la qualité des status* (1729) 272, 309, 316; 1 LAINÉ 234, 334.

the place where the land was situated. Therefore, under the common law, if the spouses own real estate in ten different countries, ten different matrimonial laws must be consulted, each applying to its respective immovables only. The point of contact is the immovable itself; the place where the spouses are or where the assets are managed is irrelevant. This conception implies that no problem arises other than that of determining the interests of one spouse in the lands of the other. In fact, section 237 of the Restatement contents itself with declaring: "The effect of marriage upon interests in land owned by a spouse at the time of marriage is determined by the law of the state where the land is."

2. American Rules on Movables

Movables, according to the old rule, follow the person, *mobilia ossibus inhaerent*; rights in movables, created under the law of the domicile, have extraterritorial effect. With respect to marital property, this rule is well settled in the United States despite occasional inroads made by the law of the situs.³ Accordingly, the mutual interests of husband and wife in each other's movables are localized at the place of the interested parties.

So far the rule is unassailable. Doubt is cast on the rule, however, so soon as we ask whether all the movables belonging to a married person are together thought to form a unit, an entity, or whether each asset is a separate unit. The conception of all the movables constituting one unit seems to obtain when the prevailing rule is justified by the "desirability of applying a single uniform regime to the entire estate of the parties,"⁴

³ It is remarkable, however, as a token of the strength of the territorial theory that the cases that actually or apparently preferred the *lex situs* are continually emphasized by the writers; and this theory was adopted in the proposed Final Draft of the Restatement § 311.

⁴ Note, 43 HARV. L. REV. (1930) 1287; STUMBERG, 11 TEX. L. REV. (1932) 63, *supra* n. 1; LEFLAR, 21 CAL. L. REV. (1933) 233, *supra* n. 1.

or when it is stated more precisely in the words of Beale ⁵ to be motivated by the consideration that

"These (movables) are brought together into an aggregate unit, and from the time of acquisition become part of that unit, and . . . the entire unit is treated by third parties as well as the spouses as a unit."

We should like to think that this idea means that the law of the marital domicile thus governs more problems than the single problem mentioned above concerning the existence and nature of the interests of husband and wife in each other's property. But we are warned against any such supposition by the language of the Restatement, which again speaks exclusively of "rights or other interests in movables" (§§ 289 ff.) and when we find similar expressions used by the writers. We shall see, indeed, that many, although certainly not all, other problems regarding the relationships between the spouses, as well as between them and third persons, are treated in American common law as belonging to the fields of contract, tort, or quasi-contract rather than to that of marital law. Apparently, the formulation of conflicts rules in this country has been unduly influenced by the narrow scope of the matrimonial law believed to remain after the passage of the Married Women's Acts. Furthermore, insufficient attention has been paid to the problems arising under the community property systems and to the regulations of the rest of the world.

3. Continental Rules on Marital Property Relations

Quite a different picture is presented by the traditional European marital laws, for which Central Europe has most fully elaborated the general theories. The tangible and intangible assets of the parties (*activa*) are conceived as forming one part of a major whole, viz., the estate, while the debts of the spouses form the other part. Therefore, inquiry is not

⁵ 2 BEALE § 290.1.

limited to the determination of those interests which one spouse may have in the assets of the other, but it is also directed to the obligations that may arise between the spouses, the liability of either to creditors, the enforcement and execution of claims during coverture and after its termination, management of the wife's goods other than those pertaining to her separate estate, presumptions as to ownership, and like questions. All these problems are regarded as forming one complex unit, similar to an inheritance treated as an aggregate, to which one conflicts rule applies.

Generally, such a system extends to every asset, but in England and Argentina immovables are excepted and assigned to the *lex situs*, just as they are in this country. But even in these countries the system is not confined to the mutual interests of the spouses in each other's property.

The Continental systems, of course, are recognized in any common law court in accordance with its conflicts rule; nobody would think of refusing recognition because such a property regime is "unknown in the *lex fori*." ⁶

4. Scope of the Marital Property Law

It is important to emphasize the comparatively broad scope of marital property law in civil law countries.

In the American system also, the "effect of marriage upon the interests of one spouse," to use the expression of section 237 of the Restatement, refers to all rules of the applicable municipal law under which, by virtue of the marriage, property rights or interests are created, modified, or terminated. In particular, both in the United States and in civil law countries, these rules determine what powers of management one spouse may exercise and what control the other may have; to what extent freedom of alienation is affected; who is the

⁶ See BECKETT, "The Question of Classification ('Qualification') in Private International Law," 15 Brit. Year Book Int. Law (1934) 46 at 57.

proper party to sue and be sued with respect to the property of either spouse; ⁷ and similar questions.

In civil law countries, marital property law also includes the effects of such events as voluntary or judicial separation, divorce, postnuptial agreements, bankruptcy, and abuse by the husband of his rights of management. In principle, this is true in the United States too, but there are many variations and exceptions.

Although article 191 of the *Código Bustamante* subjects the wife's right to recover her dowry to her personal law, a rational solution requires that either the matrimonial law of the spouses or the general contracts law governs.⁸ The former is the right solution where the applicable matrimonial law includes special rules on dowry, e.g., in Austria and Italy; in France the matrimonial law has been applied to a dowry constituted under the law of Maryland.⁹

In community property states everywhere, marital property law determines what constitutes the community fund and what the separate property of either spouse, and in addition the questions of management, possession, and control by the wife and the husband, respectively, the actions permissible during the community, the termination and partition of the common fund, *et cetera*.

An integral part of these systems is also the regulation of liability of the different estates of the parties for debts either of the community or of the husband or wife. Liability of the community property for community debts only, as in Washington, or also for the debts of the husband as in Louisiana, or for all debts of the husband and the prenuptial debts of the

⁷ See *Williams v. Pope Manufacturing Co.* (1900) 52 La. Ann. 1417, 27 So. 851 (married woman, domiciled in Mississippi, allowed according to the (matrimonial) law of Mississippi to sue in tort in Louisiana, as the tort had been suffered there). See also *Texas & Pacific Railway Co. v. Humble* (1901) 181 U. S. 57; *Traglio v. Harris* (C.C.A. 9th, 1939) 104 F. (2d) 439.

⁸ Cf. RAAPE 342.

⁹ App. Nimes (Dec. 10, 1912) D.1914.2.169.

wife, as in California, is naturally considered by the lawyers of those states as growing out of the marriage. The same approach is used in Europe, not only with respect to a system of community but to any marital system, in classifying the problem of the husband's liability for prenuptial or postnuptial debts of his wife and vice versa. This does not seem to be the usual way of thinking in this country but should be recognized as the actually governing principle.

As a matter of fact, if marriage property law is defined in the conflict of laws as dealing with problems of title to property only, its scope is much narrower than in European countries. To visualize the difference and the attendant difficulties, let us assume that German spouses are domiciled in Germany and that the wife has been charged with a criminal offense but acquitted. Under the German Civil Code (§ 1387, No. 2), the husband is obliged to pay or to reimburse his wife for the expense of her defense, and as a co-debtor he is personally liable to his wife's creditors, e.g., to her attorney. If her husband can be sued in an American common law court, what attitude should that court take? Should it classify the problem according to the *lex fori*? It might find that no such claim is granted to the wife or her attorney by the matrimonial law of the forum although some claim under another theory may be prosecuted. Obviously, the desirable solution is that German matrimonial law as the law of the domicile should be applied in its full bearing.

If we change the facts of the case slightly, there would probably be no doubt at all about an American court's reaching an analogous solution where the husband, under the German Civil Code (§ 1385), has to pay the taxes, interest on mortgages, and insurance premiums for those assets of his wife of which he is possessed *ex iure mariti* during coverture. These debts may be compared with the liabilities which are often indicated as incidents of community property.

Conversely, a German court, applying the essentially narrower matrimonial law of a common law state, faces the question of what to do about matters considered part of the matrimonial law in Germany but not so considered by the governing foreign law. If, for instance, American parties are domiciled in a common law jurisdiction and the wife borrows money with the consent of her husband, the latter would be liable to the creditor only upon his assumption of a guaranty. Under the German Code (§ 1386 par. 1), however, the husband is liable for the interest on the loan, both wife and creditor being able to enforce the liability (§ 1388), which extends to the reserved property of the wife as well as to the husband's own property. If the German court follows the characterization appropriate to the civil law doctrine, it has to consider the problem as one of matrimonial law and therefore governed by the law of the American domicil. The most sensible consequence seems to be to adopt the conflicts rule applied in this country to surety contracts. Or, instead of the law of the place of contracting thereby indicated, should the German judges, as in other contracts cases, apply the law of the place of performance, as required by the German conflicts rule? The result would be that reached neither in Germany nor in the United States.

An analogous question concerning torts was raised before a French court. Article 1477 of the French Civil Code provides as part of the matrimonial law that a spouse diverting or concealing any effects of the community property shall be deprived of his share of such effects. The judge considered this provision inapplicable to an Italian couple and granted the ordinary remedies common to both French and Italian private laws.¹⁰

In conclusion, it would seem that the broad concept of marital property law, as developed in Europe, can conven-

¹⁰ Trib. civ. Seine (Feb. 6, 1897) *Clunet* 1899, 771, criticized by *CLUNET* in *Clunet* 1899, 740; see also *BARTIN*, 2 *Principes* 284.

iently be employed in the United States whenever reference to the civil law in this field is to be made, and that, moreover, the scope usually allocated to marital property law needs enlargement.

5. Relation Between the Marital Property Law and the *Lex Situs*

As is well known, the law of the domicile or the national law governing either movables or all property may clash with a divergent law established at the situs. On the one hand, German writers have attempted to develop a theory of the relation between general conflicts rules (such as the rules on marital property or inheritance) and special rules (such as those of property referring to the *lex situs* or of obligations referring to the *lex loci solutionis*).¹¹ On the other hand, fear of friction has fostered the broad scope of the *lex situs* in the United States.

Necessary role of the lex situs. What problems must be governed in all systems by the law of the situs? The *lex situs* determines quite naturally the kinds of property interests and the modes of their creation, transfer, modification, and termination, and it decides to what extent, if at all, bona fide purchasers and attaching creditors are protected in their expectations.¹² In its application to problems of marital property rights, the law of the situs may come into conflict with the personal law. The personal law may grant one spouse some property interest in an immovable of the other, for instance, a lien, which is unknown at the situs of the immovable, or the personal law may provide that, immediately upon the marriage and without any conveyance, certain assets of the spouses are transformed into a community fund, while no such transformation by immediate operation of law is known under the law of the situs. In all such cases, the law of the situs prevails

¹¹ Cf. MELCHIOR 398; M. WOLFF, IPR, 51, 52.

¹² Note, 43 HARV. L. REV. (1930) 1286; cf. LEFLAR, 21 CAL. L. REV. (1933) 221, 235, *supra* n. 1.

over the personal law insofar and only insofar as such immediate property questions are concerned.

Thus, the Montevideo Treaty¹³ limits the matrimonial law of the domicile insofar as its application is prohibited by the law of the place where the property is situated, with the significant restriction in the 1940 draft to matters *de estricto carácter real*, i.e., which pertain strictly to real rights.

Illustration: Before the unification of the German civil law, a couple domiciled in Westphalia lived under the system of community property, whereby the land owned by one spouse, immediately upon marriage, fell into joint tenancy by both parties. The wife owned land in Saxony, where, however, no transfer of land ownership could take place without a conveyance. The Court of Appeals of Saxony held that the wife continued to be the sole owner but that she was bound by reasonable application of the personal law to execute an appropriate conveyance.¹⁴

In the same sense, it has been held in France that restraints upon the husband's alienation of his wife's dowry or liens to secure claims of the wife against her husband, provided by the personal law, are recognized as an interest in French immovables only to the extent and subject to the conditions under which the analogous rights of French law are established.¹⁵ An express provision of the former Italian Code was understood in the same way.¹⁶ The maxim underlying all these cases has been formulated by Zitelmann in the following

¹³ Treaty on international civil law, text of 1889, arts. 40, 41; text of 1940, art. 16.

¹⁴ OLG. Dresden (Dec. 1, 1896) 18 Ann. Sächs. OLG. 513; cf. LEWALD 178, 179 no. 239; analogous decision of RG. (April 20, 1903) JW. 1903, 250. An interest created under Maltese matrimonial law was dependent on publication in Tunis for absolute effect against third persons. Trib. Tunis (March 15, 1905) Clunet 1906, 444.

¹⁵ Trib. civ. Seine (Aug. 20, 1884) Clunet 1885, 76; Trib. civ. Seine (Jan. 12, 1889) Clunet 1899, 346; cf. NIBOYET 635 no. 507, but also 3 ARMINJON 109 n. 2. On a different recent practice see above, p. 327.

¹⁶ LEWALD, 29 Recueil 1929 IV 532 n. 1, approved by FEDOZZI 642, disagreeing with other writers.

sentence: "*Das Vermögensstatut lebt nur durch die Anerkennung der Einzelstatuten.*"¹⁷ It has been decided in Canada that marriage settlements concerning property situated in another country are enforceable "so far as the *lex situs* does not prevent their being carried into execution."¹⁸

American conception of the lex situs. In comparison with the American law of situs, the European property law has a very modest function. It does not determine the regime under which the spouses shall live, with its innumerable ramifications, and of course not the requisites and construction of a marriage settlement. It merely decides the technical execution of the commands of the personal law.

Under the American system as in feudal times, however, the law of the place where the immovable is located determines every question relating to the extent and content of the effects of marriage on property. Normally, foreign law is applied at the situs, neither to determine the property interests which one spouse may have in the assets of the other nor, if our assumption concerning the actual scope of American marital law is right, to determine what liabilities, if any, exist with respect to real property and whether the real property of one spouse is liable to the creditors of the other spouse. In contrast to movables, the law of the situs, and not the domiciliary law, is considered competent to fix the economic purposes of the marriage institution and to formulate public policy concerning administration by the husband, control by the wife, and protection of the creditors. This means, furthermore, that there are as many matrimonial laws as there are states where either of the spouses has immovable property.

Even the capacity of married women with respect to all transactions connected with an immovable is governed by the

¹⁷ ZITELMANN in Festschrift für Otto Gierke (1911) 255 at 261; LEWALD 178 no. 239.

¹⁸ *In re Jutras Estate* (Saskatchewan) [1932] 2 W.W.R. 533, at 537.

law of the state where the immovable is located and, in accordance with the ordinary rule of this country, not by the law of the place of contracting.

An explanation sometimes offered for the broad rule on immovables in the United States is that it is an essential function of a state to determine the title to interests in land. But does it not suffice that the property interest as such be governed by local law? Why should the local law also try to determine the effects of marriage? Moreover, if this proposition were correct, the law of the situs would also have to be applied to movables. Some American writers have indeed claimed for the situs "a sort of primary control over property within . . . its border,"¹⁹ a claim quite unknown outside the United States. The law of the situs is said to have the power to decide what effect, if any, should be given to the law of the domicile, and the latter is said to be applicable not on the basis of an independent rule of conflict of laws but only indirectly by way of reference by the law of the situs. Attempts have been made to explain a few decisions²⁰ in this way, but these appear to be inspired rather by considerations of public policy.²¹ It would be absurd to assume that the courts of the domicile itself or the courts of a third state could not apply the law of the domicile without the permission of the law of the situs. True territorialism, furthermore, would require that the municipal law of the situs be applied, not merely its conflicts rule.²²

There exists, however, an important restriction upon the application of the *lex situs*. In almost all American jurisdictions,²³ immovables acquired by assets pertaining to the sepa-

¹⁹ LEFLAR, 21 Cal. L. Rev. (1933) 221, 225, 230, *supra* n. 1. The Restatement § 8 (1) seems to share this view.

²⁰ Locke v. McPherson (1901) 163 Mo. 493, 63 S. W. 726; Smith v. McAtee (1867) 27 Md. 420, 92 Am. Dec. 641; *cf.* Graham v. First National Bank (1881) 84 N. Y. 393, 38 Am. Rep. 528.

²¹ *Cf.* STUMBERG, 11 Tex. L. Rev. (1932) 53, 61, *supra* n. 1.

²² WIGNY and BROCKELBANK, Exposé 331 n. 1 to art. 289.

²³ JACOB, "The Law of Community Property in Idaho," 1 Idaho L. J. (1931) 1, 36.

rate property of one spouse, are his separate property, and when acquired with community property are community property—the so-called replacement or source doctrine.²⁴ As a result, the impact of the *lex situs* to a considerable extent is qualified by the operation of the *lex domicilii* influencing the ownership of assets used for acquiring immovables in another state.²⁵ This may be the law of the actual or of the former domicil of the spouses. The *lex situs*, of course, retains its power over acquisitions of immovables through earnings, gifts, and succession or distribution on death.²⁶ The courts ordinarily also apply the *lex situs* without hesitation in determining the validity and construction of such contracts by the husband or the wife as dispose of land, in adjudging the ownership of profits and fruits, and in ascertaining the internal relations between the spouses with respect to their interests in immovables.²⁷

Illustration. The husband bought land in Idaho with money earned in Michigan, and acquires separate property despite the community property system of the former state. But, if he deeds the land to his married daughter domiciled in New York, there is a presumption, under Idaho law, that the property is held in community by her and her husband.

The converse case has been singularly treated. If land is sold in the state where it is situated and thus be converted into money or a chose in action, the movables so acquired should also, under the doctrine of replacement, to be consistent, be substituted for the land and remain subject to the law of the situs. But in a series of early cases, it was thought in the court of the matrimonial domicil that, thanks to the conversion effected at the situs, the time had come to apply the *lex fori*

²⁴ So named by JACOB (precedent note). See also *In re Gulstine's Estate* (1932) 166 Wash. 325, 6 P. (2d) 628.

²⁵ See NEUNER, 5 La. L. Rev. (1943) 167, 169, *supra* n. 1.

²⁶ See for example the distinctions made in *Newcomer v. Orem* (1852) 2 Md. 297, 56 Am. Dec. 717.

²⁷ See cases collected by NEUNER, 5 La. L. Rev. (1943) 172, 173, *supra* n. 1.

of the domicile to the movables acquired.²⁸ In two other old cases, temporary differences of policy with respect to the emancipation of married women caused one court at the domicile²⁹ and the other at the situs³⁰ each to apply its own domestic law to the proceeds, in order to enforce in the interest of the wife the progressive view of the forum against the old common law principle. Inferences as to the present rules can scarcely be drawn from these decisions.

The lex situs in other countries. The system founded by the postglossators, which places the effects of marriage on immovables under the law of the situs, has been adopted by Great Britain, the United States, and Argentina, and the Austrian courts.³¹ A similar situation exists with respect to Swiss immovables belonging to Swiss nationals.³²

In France, Italy, and other Latin countries, this system has been applied in a few decisions,³³ though by prevailing opinion it has long been abandoned.³⁴ French public policy

²⁸ Courts applying their own common law on marital property rather than the community property rule of the *lex situs*: *Kneeland v. Ensley* (1838) 19 Tenn. 620; *Newcomer v. Orem* (1852) 2 Md. 297, 56 Am. Dec. 717; *Castleman v. Jeffries* (1877) 60 Ala. 380. Court of community property system not applying the *lex situs* of Georgia: *Henderson v. Trousdale* (Sup. Ct. 1855) 10 La. Ann. 548.

²⁹ *Glenn v. Glenn* (1872) 47 Ala. 204, refusing application of the old common law principle of South Carolina.

³⁰ *Smith v. McAtee* (1861) 27 Md. 420, 92 Am. Dec. 641, rejecting pathetically the old common law principle of Illinois.

³¹ Argentine Civil Marriage Law (1888) art. 6. Austria: OGH. (Oct. 22, 1924) 6 SZ. 778 no. 337.

³² NAG. art. 28 no. 1. This reservation of the local law is understood to cover capacity to contract and acquire by will, STAUFFER, NAG. art. 28 no. 14. SCHNITZER 265, 133, 243 observes that before the Swiss Civil Code the law of the canton of origin and not that of the *situs* was meant; thus the system was not exactly that of the *lex situs*.

³³ Cass. (civ.) (April 4, 1881) *Clunet* 1881, 426; see also OLG. Colmar (Dec. 21, 1911), as a German court, DJZ. 1913, 174; *CLUNET* in *Clunet* 1907, 676. Outside of France, it is often not understood that this opinion is obsolete.

³⁴ France: Principle of indivisibility, NIBOYET 601 no. 478; WEISS, 3 *Traité* 171, 4 *ibid.* 195; 2 ARMINJON 465; AUDINET, 40 *Recueil* 1932 II 289ff. Belgium: POULLET 443ff.

Italy: DIENA, 2 *Princ.* 148.

Portugal: CUNHA GONÇALVES, 1 *Direito Civil* 689 (excepting only special laws on immovables).

Spain: Trib. Supr. (Jan. 28, 1896) 79 *Sent.* 125 at 133; Cf. TRÍAS DE BES no. 138.

even goes so far as to make equal treatment of movables and immovables imperative, the nature of the conjugal association being said to require that all its effects be regulated by one single, immutable law. Hence, it has been repeatedly decided in France that the American regime of separation of assets applies to French immovables owned by Americans, the American rule to the contrary notwithstanding.³⁵

In Austria, there was a split of authority on this point.³⁶

In the Scandinavian Convention on Family Law (art. 3, par. 2), only the right to dispose of immovables is reserved to the local law.

Louisiana rule. In Louisiana, statutes have expressly provided since 1852 that the community property system there in force applies to all property, including movables, acquired in Louisiana "by non-resident married persons."³⁷ The courts have given effect to this provision in order to grant the outstanding benefits of the Louisiana community system to the wife with respect to real property acquired in the state,³⁸ but have declined to apply this provision to choses in action,³⁹ while their position as regards tangible personal property does not seem entirely settled.⁴⁰ How this strange rule can be fitted into a well coordinated law of conflicts seems not to have been discussed so far.

The Civil Code of Latvia also subjects to the *lex fori* all property of spouses not domiciled in the country.⁴¹

³⁵ Cass. (req.) (July 18, 1905) Clunet 1906, 446, Revue 1906, 200; Trib. civ. Versailles (May 15, 1924) Revue 1925, 240, 252; Trib. Meaux (May 4, 1928) Clunet 1928, 1223, 1228.

³⁶ The courts were traditionally for the *lex situs*; cf. 1 EHRENZWEIG-KRAINZ 106.

³⁷ La. Rev. Civ. C. Ann. (1932) art. 2400.

It is doubtful whether art. 164 of the Cal. Civ. C. of 1872, as amended in 1917 and 1923, is to be understood in a similar sense. Cal. Civ. C. (Deering, 1941) 60 ff., § 164; cf. 10 Cal. L. Rev. (1921) 154; STUMBERG, 11 Tex. L. Rev. (1932) 56, 58, *supra* n. 1.

In Texas no such case has been found, STUMBERG, *ibid.* 65.

³⁸ Succession of Dill (1923) 155 La. 47, 98 So. 752.

³⁹ Williams v. Pope Manufacturing Co. (1900) 52 La. Ann. 1417, 27 So. 851.

⁴⁰ DAGGETT, The Community Property System of Louisiana (1931) 109-111.

⁴¹ C. C. (1937) art. 13 sentence 2.

Deference of Continental countries to the Anglo-American rule of lex situs. The application of the law of the situs to marital property interests in immovables in some countries, particularly those following the Anglo-American system, has been taken into consideration by several other countries, which in such cases allow their own personal law to yield to the *lex situs* to a greater extent than usual (see page 335). The outstanding provision of this kind, article 28 of the Introductory Law to the German Civil Code, leaves the determination of interests in or respecting foreign immovables or movables to such particular local provisions as claim to govern at the situs. Thus, all rules applied in Maine or California with respect to immovables of a married person—at least insofar as these rules are classified in America as rules of matrimonial character⁴²—are respected and applied in Germany as well. Article 28 of the German law has been followed with respect to immovables by the Hague Convention of 1905 on Effects of Marriage (art. 7) and other codifications.⁴³ The reservation is applied, for instance, to homestead provisions.⁴⁴ French courts, however, profess a radically contrary policy; in their eyes unity of the matrimonial regime has the dignity of an inevitable dogma.⁴⁵

Rationale. The American system of isolating interests in immovables, although it has hardly ever been justified on rational grounds,⁴⁶ is based on firm traditions and is undisputed in its reign. Its principal advantage lies in the simplicity with which it enables a court to determine the interests of the

⁴² One of the many questions not hitherto discussed, because the fundamental difference in scope between the matrimonial laws of this country and Europe has been neglected.

⁴³ Hague Convention on Marriage Effects, art. 7.

Poland: Law of 1926 on international private law, art. 16.

Contra: Denmark: see BORUM and MEYER, 6 Répert. 219 no. 44.

⁴⁴ CUNHA GONÇALVES, 1 Direito Civil 689 with reference to the Portuguese Decree no. 7033 of October 16, 1920.

⁴⁵ See *supra* p. 341 and *infra* p. 359.

⁴⁶ On the specious justifications by the ancient scholars, see 1 BAR § 181.

parties. This simplicity exists, however, only so long as the court has to deal with isolated legal relationships regarding a specific piece of land. Complications similar to those arising in cases of succession or bankruptcy arise when assets are located in different states and are to be treated as belonging to a single estate, either in the relation of the spouses to each other or in their relations with third parties.

The European system of treating all problems of property relations as one single complex, subject to one single law, avoids the difficulties that arise when different assets belonging to the same persons are subjected to different laws. It creates so many complications of its own, however, that it is problematical which of the two systems should be preferred. The greatest practical difficulties are caused by the coexistence of two such fundamentally different approaches. International cooperation of the type suggested by the Hague convention and generous concessions such as those made to the Anglo-American system by the Introductory Law of the German Civil Code, might smooth over some of the friction between the two systems.

II. THEORY OF IMPLIED CONTRACT

Another basic difference in views concerns the relationship between the matrimonial law and the marriage settlement.

I. French Practice

The French courts still follow the theory of Dumoulin, who advocated in 1525 that the effects of marriage upon property should be determined primarily by the intention of the parties. This theory is well known in this country too; in the famous opinion in *Saul v. His Creditors*,⁴⁷ Porter, J., although rejecting certain elaborations of Dumoulin's theory as de-

⁴⁷ (1827) 5 Mart. N. S. (La.) 569. A mistake by Judge Porter in interpreting the Spanish law has been noted by DE FUNIAK, 1 Principles of Community Property (1943) 249.

veloped in later French and Spanish practice, adopted the principal ideas of the theory. In the opposite doctrine, marriage effects belonged to the domain of the various territorial ("real") statutes, which were in fact multiple and inconsistent customs. To free the relations between husband and wife from this entanglement, the parties were declared free to regulate their rights and duties by marriage settlement once and for all, the extraterritorial effect pertaining to the personal "statute." Even in cases where the parties had made no settlement, they were said simply to have tacitly agreed to subject themselves to a certain local custom, preferably to the custom in force at the marital domicile, identical for practical purposes with the domicile of the husband at the time of the marriage.⁴⁸

(a) *Method and result of French cases.* The full liberty of the parties to make any settlement they choose is still recognized by the French courts, which continue to imply a tacit contract in the absence of a settlement.⁴⁹

While once this method resulted in the general application of the matrimonial law of the first domicile, it is now employed more consistently with the original idea; in order to determine the presumed intention of the parties, all facts of the individual case are taken into consideration, including the conduct and statements of the parties after the marriage.⁵⁰ Criticism of this method of practical interpretation⁵¹ has been answered by the *Tribunal de la Seine* with the argument that manifestations of the parties during marriage, though they cannot modify the regime adopted at the time of the marriage, nevertheless give

⁴⁸ Cf. CALEB, *Essai sur le principe de l'autonomie de la volonté en droit international privé* (1927) 135; NIBOYET 792 no. 684; 3 ARMINJON 87ff. nos. 88ff.

⁴⁹ Cass. (civ.) (July 11, 1855) S.1855.1.699; Cass. (req.) (July 15, 1885) Clunet 1886, 93; Cass. (req.) (May 18, 1886) Clunet 1886, 456. See other decisions cited by WEISS, 3 *Traité* 639ff.

⁵⁰ Constant practice, as the *Répertoires* attest; cf. particularly Cour Paris (Dec. 7, 1887) D.1888.2.265; Cass. (req.) (June 4, 1935) Clunet 1936, 898; Cass. (req.) (April 6, 1938) S.1938.1.151, Clunet 1938, 788.

⁵¹ NIBOYET 833 no. 716; PILLET, 2 *Traité* 225.

significant support to the assumptions of the court.⁵² By these methods, it has been presumed that the parties have tacitly agreed to adopt the law of the domicil of the husband or that of their common nationality or that of an intended future domicil.⁵³ But as an after-effect of the old domiciliary tradition, the presumption of a tacit agreement to the law of the real or intended marital domicil seems to be preferred,⁵⁴ the latter especially when it happens to result in the application of French law. Some decisions have aroused amazement. Thus, a Swiss married a French woman in New York, went with her to Switzerland and many years after to France, but French law was presumed intended.⁵⁵ The same result was reached in cases where sixty years after the marriage the bodies of the spouses were brought to France⁵⁶ and where Swiss spouses had stayed in France no longer than three weeks.⁵⁷

(b) *Influence of the French doctrine on other countries.* The French system has been followed by some courts in other countries⁵⁸ and hinted at in the statutes of Spain, Portugal,

⁵² Trib. civ. Seine (May 11, 1933) *Revue Crit.* 1934, 129.

⁵³ See the report of Brachet in Trib. civ. Versailles (May 15, 1924) *Revue* 1925, 241, 245. See also JOELSON, *op. cit. supra* n. 1, at 91.

⁵⁴ CALEB, 4 *Répert.* 180 no. 69ff.; *cf.* Cour Paris (Nov. 18, 1937) *Clunet* 1938, 310; Cour Paris (March 2, 1938) *Clunet* 1938, 544. In Switzerland this was erroneously believed to be the French law; *cf.* SCHNITZER 197.

⁵⁵ Trib. civ. Belfort (June 13, 1911) and Cour Besançon (March 18, 1912) *Clunet* 1913, 171.

⁵⁶ Trib. civ. Versailles (July 19, 1927) *Clunet* 1928, 429; 3 FRANKENSTEIN 296.

⁵⁷ Cour Paris (June 28, 1937) *Schardon c. Chavon*, *Clunet* 1938, 537; the commentator, *ibid.* 540 is surprised, but the Cour of Cassation affirmed (May 5, 1938) *Gaz. Pal.* 1938.2.232, *cf.* 7 *Giur. Comp. DIP.* no. 128.

⁵⁸ To this effect Belgium: Trib. civ. Anvers (Dec. 26, 1925) *Pasicrisie* 1926.3.24; Trib. civ. Bruxelles (Dec. 2, 1925) *Pasicrisie* 1926.3.117; App. Bruxelles (June 13, 1931) 18 *Bull. Inst. Belge* (1932-1933) 53; Trib. civ. Bruxelles (March 29, 1933) *Pasicrisie* 1934.3.19. Similarly POULLET 478 no. 372, 573 no. 449. Other decisions, however, followed the national law. See *infra* p. 349, n. 82.

Brazil: with respect to marriages anterior to the Civil Code see VALLADÃO 153 and more recently Sup. Trib. Fed. (June 12, 1940) *In re Wolner*, 140 *Revista dir. civ.* (1942) 281 (submission to the Brazilian general community property system, assumed to have been effectuated by declaration in the marriage record,

and in the original text of the Treaty of Montevideo.⁵⁹ The Civil Code of Louisiana varies the French doctrine by declaring that "every marriage contracted in this State, superinduces of right partnership or community of acquiescence or gains, if there be no stipulation to the contrary";⁶⁰ of course, this is not an interpretation of the parties' intention but a statement of the legal regime.

In England, the contractual theory has exercised some influence. An express marriage settlement is construed according to the law presumed to be intended by the parties; ordinarily, the effect is that, by a rebuttable presumption, it is governed by the law of the marital domicile.⁶¹ Moreover, although no longer popular, the doctrine of intended marital domicile has not been forgotten.⁶² Finally, the inference from a tacit marriage covenant to an immutable law of the first domicile, which was rejected in *Saul v. His Creditors*, was proclaimed in *De Nicols v. Curlier* as late as 1898.⁶³ The case, however, referred to a marriage celebrated in France by parties domiciled in France; a tacit marriage agreement was assumed, because the French courts administering the law of the domicile would have proceeded by this method. Neither in England, according to the better view,⁶⁴ nor in Canada, according to the distinctly

without marriage settlement; *per abundantiam* the Austrian law, possibly national law of the parties is understood, with KRASNOPOLSKI, Oesterreichisches Familienrecht (Wien, 1911) § 17, as permitting autonomy of the parties (at 287)).

The Netherlands: A few older decisions overruled by H. R. (May 17, 1929) W. 12006; on a later decision of Hof den Haag (Feb. 6, 1931) W. 12373 see VAN DER FLIER, Clunet 1933, 1110.

⁵⁹ Spain: C. C. art. 1325; Portugal: C. C. art. 1107; Belgian Congo: C. C. art. 12; but all these are rather harmless reminiscences, M. WOLFF, 4 Rechtsvergl. Handwörterb. 410; Treaty of Montevideo on international civil law, text of 1889, art. 41 (the marital domicile expressly agreed upon by the parties before the marriage).

⁶⁰ La. Rev. Civ. C. Ann. (1932) art. 2399.

⁶¹ *In re Fitzgerald, Surman v. Fitzgerald* [1904] 1 Ch. 573; *In re Bankes, Reynolds v. Ellis* [1902] 2 Ch. 333, etc. CHESHIRE 495ff.

⁶² *In re Martin, Loustalan v. Loustalan* [1900] P. 211, 239; See WESTLAKE 72 § 36; DICEY 765.

⁶³ [1898] 1 Ch. 403; [1900] 25 A. C. 21.

⁶⁴ CHESHIRE 492, in contrast with 495.

adopted opinion, is such construction imitated. In the absence of an express settlement and a will, marital property is governed by the law of the husband's domicile. Hence, the community system of Quebec was applied in Ontario to spouses who had their first domicile in Quebec, because the law of Quebec like the French referred to the presumable intention of the parties to choose the local regime rather than because the Ontario court shared the theory of implied contract.⁶⁵

(c) *Influence on America*. In the United States, the old French doctrine had some influence on Story.⁶⁶

The "intended domicile" appeared in a few decisions⁶⁷ but has been rejected by prevailing opinion as well as by the Restatement.⁶⁸ A contemplated domicile which, because of a change of mind, does not become a home in fact, may figure as an important element in ascertaining the law tacitly chosen by the parties in setting up a marriage contract, but it is no veritable domicile at all and is therefore neglected in this country; domicile is the test for the determination of marital property rights in movables, independent of any intention of the parties.

In Latin America, while the Montevideo Treaty of 1889 testifies to the widespread adoption of the theory of intended marital domicile, the new text of 1940 evidences a disposition to abandon the theory.⁶⁹

(d) *Opposition to French practice*. The literature, including the modern French writers,⁷⁰ unanimously rejects the old

⁶⁵ See *Beaudoin v. Trudel* (Ont. Ct. App. 1936) [1937] 1 D.L.R. 216, *In re Parsons* (Ont.) [1926] 1 D.L.R. 1160.

⁶⁶ STORY §§ 198, 199.

⁶⁷ *Ford's Curator v. Ford* (1824) 2 Mart. N. S. (La.) 574, 578, 14 Am. Dec. 201; 1 WHARTON 402 § 190.

⁶⁸ Restatement § 289; 2 BEALE § 289.1 n. 3; GOODRICH, "Matrimonial Domicile," 27 Yale L. J. (1917) 49 at 50 (against STORY); STUMBERG, 11 Tex. L. Rev. (1932) 53, 55, *supra* n. 1 and in his *Principles of Conflict of Laws* 285; cf. CHESHIRE 492.

⁶⁹ Art. 16. *Supra* n. 59; see also 1 RESTREPO HERNÁNDEZ no. 224.

⁷⁰ BARTIN, D.1898.2.457, BARTIN, 2 Principes 247 no. 302; PILLET, 2 Mélanges 95; VALÉRY 1128 no. 794; 3 ARMINJON 101 no. 95 *bis*; NIBOYET 833 no. 716; AUDINET, 40 Recueil 1932 II 257-259, 265. As is known, DU-

French practice. The presumed intention is called an excessively fictitious assumption, and the unpredictability of a future court decision on this intention is considered intolerable.⁷¹ Of this system, it was recently said that the matrimonial law, whose main reason to exist must be found in the security of the spouses and of third persons, fails completely to serve its purpose.⁷²

It is interesting that French writers advocating reform have expressed a preference in certain cases for the domiciliary test rather than the nationality principle.⁷³ The French private draft of 1930 favors the first marital domicil.⁷⁴

III. CONTACTS

1. Domicil

Domicil is the test of the effects of marriage on property in the Anglo-American countries, Denmark, Norway, Argentina, Paraguay, and Peru,⁷⁵ recently joined by Brazil⁷⁶ in accordance with the general principles of these countries in matters of status. Furthermore, domicil, rather than nationality, has been recognized by the courts in Austria,⁷⁷ whose marital

MOULIN's contemporary, D'ARGENTRÉ, fought against extraterritorial effect of a tacit agreement, see WEISS, 3 *Traité* 29. In Italy, ANZILOTTI particularly attacked the doctrine of presumed intention.

⁷¹ LEREBOURS-PIGEONNIÈRE 407 no. 343, justifies the regard for manifestations of the parties subsequent to the marriage as a means of avoiding surprises which the courts would otherwise inflict on the parties.

⁷² SAVATIER, D.1936.1.7.

⁷³ 3 ARMINJON 104 no. 97; COSTE-FLORET, Note, 7 *Giur. Comp. DIP.* 224 no. 126.

⁷⁴ Bull. Soc. d'Études Lég. 1930, 82; cf. NIBOYET, *ibid.* 1928, 336.

⁷⁵ Denmark: MUNCH-PETERSEN, 4 *Leske-Loewenfeld I* 746; BORUM, *Personalstatutet* 455.

Latvia: C. C. (1937) § 13, extending however *lex fori* to all property situated in the country.

Norway: CHRISTIANSEN, 6 *Répert.* 575 no. 116.

Argentina: Civil Marriage Law of 1888, art. 5 par. 1.

Paraguay: Civil Marriage Law of Dec. 2, 1898, art. 5 par. 1.

Peru: C. C. (1936) Tit. Prel. art. V (for foreigners).

⁷⁶ Brazil: Introductory Law of Sept. 4, 1942, art. 7 § 4.

⁷⁷ Austria: OGH. (Jan. 5, 1864) 5 *GU.* no. 2701; OGH. (Feb. 27, 1890) 28 *GU.* no. 13176; dictum in OGH. (Oct. 22, 1924) 6 *SZ.* no. 337; *contra*: most writers, see WALKER 748.

property law has apparently continued in force after 1938. The particular system of the Swiss conflicts law extends to the property effects of marriage.⁷⁸

The domicile in question has been generally and still is the domicile of the husband at the time of the celebration of the marriage. This principle, derived from the old ideas of coverture and merger, as in England, is preferred in the United States as a simple and unequivocal test to indicate the matrimonial center, more reliable than the concept of first conjugal domicile. Yet another view has been taken in Switzerland and increasingly in Latin America, where the law of the first domicile actually established by the husband and wife in common is declared applicable.⁷⁹ But as this doctrine needs to be supplemented when the parties, because of premature death or separation or continued migration, never establish a common domicile, the husband's domicile at the marriage has to be utilized as an inevitable emergency test.⁸⁰ The *Código Bustamante* (art. 187) adopts this method also in case the parties have no common nationality.⁸¹

These divergent concepts are obviously part of the marital property laws, so as to make characterization of the domicile dependent on the applicable law.

2. Nationality

In other countries,⁸² the nationality of the husband is the test adopted and is preferred to the possibly different nation-

⁷⁸ Switzerland: NAG. arts. 19, 20, 32; cf. HUBER-MUTZNER 472.

⁷⁹ Switzerland: BG. (Sept. 19, 1929) 55 BGE. II 231. Treaty of Montevideo on international civil law, text of 1940, art. 16.

Brazil: Introductory Law of 1942, art. 7.

⁸⁰ Opinion adopted in Switzerland following TEICHMANN; see STAUFFER, NAG. 87f no. 13; BG. (Sept. 19, 1929) 55 BGE. II 230.

⁸¹ Similarly, e.g., Guatemala C. C. (1926) art. 174; Law on Foreigners (1936) art. 40; C. C. (1933) art. 116, if both parties are foreigners.

⁸² Germany: EG. art. 15, followed by Hague Convention on Marriage Effects, art. 2.

Belgium: App. Bruxelles (June 16, 1926) Pasirisie 1927.2.77, Clunet 1928, 1102; Trib. civ. Bruxelles (Jan. 15, 1934) Clunet 1935, 682.

Bulgaria: GHÉNOV, 6 Répert. 192 no. 68; GANEFF, 4 Leske-Loewenfeld I 818.

ality of the wife. In this field, unity and clarity of the regime to govern the effects of marriage on property are considered more important than attempts to satisfy both national laws. This contrasts markedly with the controversial literature respecting the effect of divided nationality on personal marital relations.⁸³

Following the general trend from nationality to territoriality,⁸⁴ however, the courts of some countries are inclined to apply their own municipal law, if the wife was a national of the forum before the marriage or at the time of suit or if the first marital domicile was established at the forum.⁸⁵ In France,

China: Law of 1918, art. 10 par. 2.

Finland: Law of 1929, art. 14 par. 2.

Guatemala: Law on Foreigners (1936) art. 40; C. C. (1933) art. 116 (in cases of common nationality of the parties).

Greece: C. C. (1940) art. 15.

Hungary: 6 Répert. 463 nos. 83, 83 *bis*, 88.

Iran: C. C. art. 963.

Italy: C. C. (1942) Disp. Prel. art. 19; as to the former law: Cass. (April 16, 1932) *Foro Ital.*, II Massimario 1932, 282 no. 1376.

Japan: Law of 1898, art. 15.

The Netherlands: Hof Amsterdam (June 6, 1919) W. 10444; VAN HASSELT 6 Répert. 630 no. 170.

Poland: Law of 1926 on private international law, art. 14 par. 3.

Portugal: C. C. art. 1107, *cf.* art. 16; CUNHA GONÇALVES, I *Direito Civil* 689.

Rumania: Cass. (Feb. 23, 1937) *affaire Grigoriou*, 7 *Giur. Comp. DIP.* no. 189.

Spain: C. C. arts. 9 and 1325 as currently interpreted; see MANRESA, 9 *Comentarios al Código Civil Español* (1908) 199.

Sweden: Law of June 1, 1912, § 1 no. 2.

⁸³ In this field only isolated voices have protested the dominant doctrines such as 2 ZITELMANN 749 who advocated a compulsory system of separate property in nationally mixed marriages.

⁸⁴ See *supra* pp. 151 ff., 348.

⁸⁵ In Spain, Spanish law has been applied where the marriage is celebrated in Spain and the wife is a national, see TRÍAS DE BES, 31 *Recueil* 1930 I 658, 680.

Regarding the Brazilian law previous to 1942 (C. C. of 1916, Introduction art. 8), decisions of the Sup. Trib. Fed., *Recurso Extraord.* no. 919, Weinberger (Dec. 20, 1916) 12 *Revista Jur.* (1918) 479, (Dec. 30, 1918) and (Dec. 20, 1919) 19 *Revista Sup. Trib.* (1919) 48 (*cf.* VALLADÃO 128, 129) modified the principles essentially for the benefit of the Brazilian party. They deal with an American from New York who married a Brazilian woman and established domicile in Brazil. He went bankrupt under the law of New York, and the wife claimed her Brazilian immovables under the common law system. The Supreme

this trend has inspired a draft proposal of the *Société d'études législatives*, basing the property regime on the law of the place where the parties "fix" their domicile immediately after marriage, of which the last version significantly limits itself to provide for the application of French law in the case of a first French matrimonial domicile.⁸⁶

On the other hand, the far-reaching arm of the national law is exhibited by the declaration of the Italian Supreme Court that a regime of general community of property, under which the spouses in Argentina believed they were living, was inapplicable, because this regime was forbidden to them as Italian nationals by article 1433 of the Civil Code (of 1865).⁸⁷ The disharmony between the Italian nationality principle and the Argentine domiciliary principle has attracted attention, in view of the millions of Italian immigrants living in Argentina, and has resulted, if not in concessions to the domiciliary law, at least in the suggestion that the parties should be induced to declare a choice of law on their marriage.⁸⁸

*Illustration.*⁸⁹ A German married woman domiciled in Zürich, Switzerland, contracted a loan with a Swiss bank. The contract was, without doubt, governed by Swiss law. The question, however, whether she could, without her husband's consent, make her nonreserved property liable, was answered in Germany under the German law of nationality, while a Swiss court would have applied the Swiss law of domicile.

Court actually applied the law of New York and not the Brazilian general community system. But the New York regime could not govern immovables in Brazil. Moreover, under the principle of renvoi, Brazilian law was competent in every respect. In the cases of São Paulo (VALLADÃO 133) the law of the forum was undisputed.

⁸⁶ Bull. Soc. d'Études Lég. 1928, 339ff., art. 20; definitive text, *ibid.* 1930, 175ff., art. 20. Cf. NIBOYET, *ibid.* 1928, 319ff., 334, Revue 1929, 193, 212.

⁸⁷ Cass. Roma (April 16, 1932) Foro Ital., II Massimario 1932, 282 no. 1376; cf. UDINA, Elementi 184 no. 135; FEDOZZI 446.

⁸⁸ FEDOZZI 451; AUDINET, 40 Recueil 1932 II 241 at 265. Cf. WEISS, 3 Traité 643, in view of the uncertain French practice.

⁸⁹ Bay. ObLG. (May 11, 1929) IPRspr. 1929, no. 75.

3. Law of the Place of Celebration

The law of the place of celebration has been invoked but rarely.⁹⁰ Except within the strict confines of title questions, the situs of movables is attributed no importance in any law.

4. Renvoi

Divergences between the law of the situs and the personal law (for instance, in the case of immovables in the United States), or between the proper law (French practice) and other principles, make place for renvoi. If two French nationals domiciled in the United States are married, under American law their movables are governed by the law of the state of their domicile; French courts would probably arrive at the same result by construction of the parties' intention.⁹¹ German courts would follow the presumed French decision under the statutory command of renvoi (EG. art. 27).

It is likewise by renvoi that, in Germany, the *lex situs* governs the effects of marriage on immovables owned by Americans.⁹² German courts have interpreted this renvoi so broadly that all questions determined in the United States according to the *lex situs* of immovables are by them decided in conformance with the German law applicable to immovables located in Germany.

Illustration: An American wife in New York owned German immovables. The law of the matrimonial domicile, New

⁹⁰ Argentine Civil Marriage Law (1888) art. 5 par. 1, probably presuming that the marital domicile is at the place of celebration. Texas Ann. Rev. Civ. Stat. (Vernon, 1940) art. 4627 declares expressly that removal to Texas subjects the marital rights of persons "married in other countries" to Texas law.

⁹¹ See the decisions above, n. 54, and LEWALD, 29 Recueil 1929 IV 567. When renvoi was followed by OLG. Colmar (Feb. 12, 1901) Clunet 1903, 666, 11 Z.int.R (1902) 282, it was done under French law, but the court was German at the time.

Spain: see MANRESA, *op. cit. supra* n. 82, at 205.

⁹² OLG. Colmar (Aug. 24, 1911) 4 Rhein Z.f.Zivil-und Prozessrecht 295; cf. OLG. München (March 15, 1913) 30 ROLG. 45 (renvoi by Hungarian law); OLG. Breslau (Oct. 31, 1929) JW. 1930, 1011.

York, did not require the husband's joinder for conveying the land. Under German matrimonial law, however, the land was a part of those assets of the wife of which she could not dispose without her husband's consent. The German court held that the American renvoi to the *lex situs* resulted in the application of all the rules of German law on matrimonial property and that, therefore, the husband's consent was necessary.⁹³ Thus, the ordinary German conflicts rule on capacity to contract was not applied. Similar arguments have been made in Switzerland.⁹⁴

The French courts are in a different position, as their doctrine of renvoi yields to their doctrine that the matrimonial property law must be supreme and unqualified.⁹⁵

The problem arising from the different scope of European and American marital property laws in the application of renvoi has not yet been properly explored. It seems obvious, however, that renvoi must be applied when the two foreign laws involved agree with each other in a certain result. Suppose that Italian spouses are domiciled first in Italy and then in Switzerland; a Swiss court would apply the Italian system of separate property so far as the mutual relations of the spouses are concerned, and Swiss law of "property union" with respect to their relations to third persons. In like case, an English court would strictly follow the Swiss court, provided the parties retain their Swiss domicil. Would an American court, disregarding the Swiss partial recognition of Italian law, also apply the Swiss principles of "property union" between the parties? Another question is still more delicate: Would an American court introduce its own distinction between movables acquired before and after marriage?

⁹³ OLG. Colmar (Aug. 24, 1911) 4 Rhein. Z. f. Zivil-und Prozessrecht 295; 3 FRANKENSTEIN 401 n. 57 approving.

⁹⁴ HUBER-MUTZNER 476 n. 417.

⁹⁵ See *supra* n. 35 and *infra* n. 122.

IV. THE PROBLEM OF MUTABILITY: CHANGE OF PERSONAL LAW DURING COVERTURE

1. Change in Legislation

If altered during the marriage, the governing municipal law, according to principles generally recognized in Europe, rules in its changed form.⁹⁶ The same law also determines what retroactive effect changes have on the matrimonial relationship.⁹⁷

In the United States, the Fourteenth Amendment in some measure limits retroactive state legislation.⁹⁸

2. Change in Status

It is an old question whether alteration of the initial domicile alters marital relations. The question now comprehends any change in the personal law⁹⁹ and is of extraordinary importance in view of the enormous differences of matrimonial property systems and the multiplied migrations of our time.

The former conception in Germanic countries seems to have been that the legal incidents of property are only an outgrowth of the personal relations between the spouses. The personal regime being mutable, the property system was held mutable too. This concept was followed in Switzerland, England, and, before the German Civil Code, in the northwestern parts of Germany and in Baden.

Nevertheless, as early as 1265 A.D., the Spanish *Partidas*, which have been so influential in the Americas, declared the matrimonial regime immutable in the face of a change in personal status.¹⁰⁰

In France from the times of the postglossators, the prob-

⁹⁶ E.g., Cour d'Aix (April 28, 1910) Clunet 1911, 199 (change from Italian to French law by the annexation of Nizza in 1860).

⁹⁷ HABICHT 128 and the general opinion in Germany.

⁹⁸ See the interesting Note, 16 Cal. L. Rev. (1927) 399.

⁹⁹ TEICHMANN, Über die Wandelbarkeit oder Unwandelbarkeit des gesetzlichen ehelichen Güterrechts, bei Wohnsitzwechsel (Basel, 1879); 2 ZITELMANN 725.

¹⁰⁰ Partida IV, ley 24, tit. XI, a very clear and neat statement.

lem was controversial; the victory of the theory construing marital property law as a tacit contractual system naturally brought with it the assumption of permanence. Moreover, in French municipal law itself, the immutability of marital regulation of property was proclaimed so as to prohibit postnuptial settlements of any kind, and finally also in the Civil Code (arts. 1394, 1395), even in the case of divorce and remarriage of the spouses (art. 295 par. 2), in the belief that, to secure conjugal peace and to protect husband and wife against their respective maneuvers as well as those of their creditors, the system of marital property must be stable. Therefore, the principle of immutability was considered imperative.¹⁰¹

On the contrary, it is characteristic of modern codifications to permit marriage settlements during marriage.¹⁰²

3. The Principles

(a) *Full mutability*. In England, the House of Lords decided in the *Hog* case (1804)¹⁰³ that parties, acquiring a domicile in Scotland after fifteen years of marriage, thereby became subject to the Scotch rule of community, and Lord Eldon held that the rule applied to all movables which Hog possessed. However, the *communio bonorum* of Scotch law was not a true marital regime but only a mode of distribution, and hence adequately governed by the law of the Scotch domicile of the deceased at the time of his death rather than at the time when he acquired such domicile.¹⁰⁴

¹⁰¹ The entire Latin group followed this model.

¹⁰² The United States: see 3 VERNIER § 156.

Denmark: Law on Effects of Marriage of 1925, c. 4 § 28.

Germany: BGB. § 1432.

Greece: C. C. (1940) art. 1405 (for modification of settlements only).

Guatemala: C. C. (1933) art. 103.

Italy: the new C. C. (1942) Disp. Prel. art. 19 par. 2, maintains immutability.

Sweden: Marriage Law of 1920, c. 8 § 1.

Switzerland: C. C. art. 179 par. 1.

¹⁰³ *Lashley v. Hog* (1804) 4 Paton (Scotch Appeals Case) 581. DICEY 767 Rule 186; CHESHIRE 493.

¹⁰⁴ WESTLAKE 73ff.; FOOTE 354 (both concluding for the system of full immutability).

In Switzerland, the principle of mutability, limited to the relations of the spouses to third persons, applies to a married couple transferring their domicil to Switzerland.¹⁰⁵

(b) *Mutability of new acquisitions.* In the United States¹⁰⁶ and Argentina,¹⁰⁷ the principle of mutability is established in the sense that only movables acquired after the change of domicil are governed by the law of the new domicil. The same principle was adopted by the Scandinavian Convention on Family Law (art. 3) and is sometimes assumed to be English law.¹⁰⁸ In the United States, the continuing effect of law on property once acquired¹⁰⁹ is the more important principle, since the interests in movables acquired under the former domiciliary law continue in any objects that may replace these movables,¹¹⁰ so long as the proceeds of the original goods can be traced.¹¹¹ (In the language of the civil law, a subrogation; *pretium succedit in locum rei*, and *res succedit in locum pretii*.) Moreover, the authorities emphasize that transfer of movables from the state where they have been acquired or from one domicil to another does not alter their condition, either as separate or community property.¹¹² This doctrine

¹⁰⁵ NAG. arts. 19, 20.

¹⁰⁶ *Matter of Majot* (1910) 199 N. Y. 29, 92 N. E. 402 rejected the doctrine of the *De Nicols* case. The great majority of American courts have adopted the law of the domicil at the time of acquisition. *Cf.* *Succession of Packwood* (1845) 9 Rob. (La.) 438, 41 Am. Dec. 341; *Pearl v. Hansborough* (1848) 28 Tenn. (9 Humph.) 426; *Castro v. Illies* (1858) 22 Tex. 479, 73 Am. Dec. 277; *Snyder v. Stringer* (1921) 116 Wash. 131, 198 Pac. 733. To the same effect the statute of Louisiana Civ. Code (1932) art. 2401; Arizona Code Ann. (1939) §§ 63-306; and Texas Ann. Rev. Civ. Stat. (Vernon, 1940) art. 4627. Restatement § 290; 2 BEALE § 290.1; DE FUNIAK, 1 Principles of Community Property (1943) 250.

¹⁰⁷ Argentine Civil Marriage Law (1888) art. 5 par. 2, followed by Paraguay: Civil Marriage Law (1898) art. 5 par. 2.

¹⁰⁸ FALCONBRIDGE, "Conflict of Laws: Examples of Characterization," 15 Can. B. Rev. (1927) 226, arguments on *De Nichols v. Curlier* [1900] A. C. 21.

¹⁰⁹ *Brookman v. Durkee* (1907) 46 Wash. 578, 90 Pac. 914; Restatement §§ 291, 292.

¹¹⁰ SCHOULER, 1 Domestic Relations § 592; 1 WHARTON 415ff. § 193a.

¹¹¹ *McAnally v. O'Neal* (1876) 56 Ala. 299, 302.

¹¹² Restatement §§ 291-293. *Brookman v. Durkee* (1907) 46 Wash. 578, 90

is generally thought to be protected by the constitutional guarantees against deprivation of property without due process of law.¹¹³ Only the technical nature of community property may have to be construed, after a transfer, so as to agree with the new *lex situs*. The debts contracted by the husband or wife likewise retain their nature as enforceable on separate or community property respectively.¹¹⁴

Under section 291 of the Restatement, however, control by the former domiciliary law ends when "the interests are affected by some new dealings with the movables in the second state." The exact meaning of this proposition is in doubt.¹¹⁵ Beale, in another place in his treatise,¹¹⁶ referring to *Drake v. Glover*, where it was said that "The *lex loci contractus* governs, 'as to the nature, the obligation, and the interpretation of a contract,'" ¹¹⁷ remarks only that dealings with movables must be carried out in accordance with the law of the new domicile.

How these rules work in practice has been illustrated during a century in a few cases only, covering only a part of the situations imaginable and leaving incertitude in many respects.¹¹⁸

(c) *Immutability*. In the field of the law of conflicts, immutability is proclaimed ordinarily by all systems following

Pac. 914 and many other decisions; see 12 L.R.A. (N. S.) 921; 57 L.R.A. 353. In Europe it goes without saying that these rules apply.

¹¹³ *In re Drishaus' Estate* (1926) 199 Cal. 369, 249 Pac. 515; *In re Thornton's Estate* (1934) 1 Cal. (2d) 1, 33 P. (2d) 1.

¹¹⁴ As to moving domicile from a separate property state to a community property state: *Hyman Lichtenstein & Co. v. Schlenker* (1892) 44 La. Ann. 108, 10 So. 623; *Clark v. Eltinge* (1902) 29 Wash. 215, 69 Pac. 736; *Huyvaerts v. Roedtz* (1919) 105 Wash. 657, 178 Pac. 801. For the inverse situation no case is illustrative; see also DE FUNIAK, 1 Principles of Community Property (1943) 532, 533.

¹¹⁵ Note, 43 Harv. L. Rev. (1930) 1286, 1289.

¹¹⁶ 2 BEALE § 292.1; cf. Restatement § 291.

¹¹⁷ (1857) 30 Ala. 382 at 389 quoting STORY 219 § 263. This distinction is universally recognized.

¹¹⁸ NEUNER, 5 La. L. Rev. (1943) 176, 178-182, *supra* n. 1, makes an interesting attempt to coordinate the cases.

the nationality principle¹¹⁹ and in addition by some others.¹²⁰ Under this principle, the spouses continue under their former matrimonial law.

Switzerland has adopted this conception, so far as the rights of the parties between themselves are concerned. The Federal Tribunal has observed that rights created under the first law survive in such form as is consonant with a new statute.¹²¹

¹¹⁹ Germany: EG. art. 15. Following this model: Hague Convention on Marriage Effects, arts. 2 and 9.

China: Law of 1918, art. 10 par. 2.

Japan: Law of 1898, art. 15 par. 1.

Poland: Law of 1926 on international private law, art. 14 par. 3.

See moreover:

Greece: C. C. (1940) art. 15; formerly by interpretation of C. C. (1856) art. 4 § 3; 2 STREIT-VALLINDAS 346 n. 22.

Guatemala: Law on Foreigners (1936) art. 40 last sentence.

French Morocco: Dahir of Aug. 30, 1913 sur la condition civile des Français et des étrangers dans le protectorat Français du Maroc, arts. 14, 15.

Spanish Morocco: Dahir de la condición civil de los españoles y extranjeros, art. 13.

Decisions in the following countries:

Austria: 1 EHRENZWEIG-KRAINZ (ed. 1) I 105.

Belgium: App. Bruxelles (June 16, 1926) *Pasicrisie* 1927.2.77, *Clunet* 1928, 1102.

France: App. Alger (Dec. 13, 1897) *Clunet* 1898, 723; Trib. civ. Seine (Dec. 28, 1900) *Clunet* 1901, 568; Trib. civ. Marseilles (July 12, 1907) *Clunet* 1908, 831; Trib. civ. Marseilles (May 8, 1913) *Clunet* 1914, 1271.

Hungary: SCHWARTZ, 40 *Z.int.R.* (1929) 170, 174.

The Netherlands: applied in the case of a Dutch husband by KG. (Feb. 26, 1925) *Z. des Deutschen Notarvereins* 1927, 58.

Spain: TRÍAS DE BES, 6 *Répert.* 253 nos. 103, 109.

Sweden: Sup. C. (July 31, 1931) *Nytt Juridiskt Arkiv*, 1931, 403, 7 *Z.ausl.PR.* (1933) 934 (Swedish spouses domiciled in the United States).

¹²⁰ Quebec: *Astill v. Hallée* (1877) 4 *Q.L.R.* 120.

Denmark: BORUM and MEYER, 6 *Répert.* 219 no. 44; cf. 10 *Z.ausl.PR.* (1936) 620, but see for another view MUNCH-PETERSEN, 4 *Leske-Loewenfeld* I 746 no. 4.

Norway: CHRISTIANSEN, 6 *Répert.* 575 no. 116; SYNNESTVEDT, *DIP. Scandinavie* 262. This rule was overlooked in *Muus v. Muus* (1882) 29 *Minn.* 115, 12 *N. W.* 343, but probably would not have changed the decision.

Treaty of Montevideo on international civil law, text of 1889, art. 43.

Rumania: Cass. (civ.) (Feb. 22, 1937) 4 *Z.osteurop.R.* (1937) 318 no. 267 (interprovincial law).

¹²¹ See NAG. art. 19 par. 1, as contrasted to par. 2 and art. 31 pars. 2 and 3; BG. (Dec. 10, 1910) 36 *BGE.* II 619; BG. (Dec. 5, 1940) 66 *BGE.* II 234 no. 48. (Swiss spouses having transferred their domicile to a foreign country

Under the rigid French notions, this approach leads to strange results. In the case of a married couple, first domiciled in New York and then in France, the separate property system of New York was applied in every respect, even to French immovables of the husband acquired after the change of domicile. This was done, although the New York matrimonial law does not extend to foreign immovables and, besides, would not be applied by a New York court to objects acquired at a new domicile. This result was based on the principles of unity (assets regarded as an aggregate unit) and of immutability, both of which go together: "*L'immutabilité et l'unité vont de pair; l'une ne peut se concevoir sans l'autre.*"¹²²

4. Exception: New Marriage Settlements

Assuming immutability as a principle of conflicts law, the matrimonial law of the first domicile or first nationality decides whether there is mutability in the field of private law, i.e., the first personal law decides whether or not the parties may make a settlement under a changed personal law.

General Continental customary law has admitted an important exception, however,¹²³ which is formulated by the German Civil Code (Introductory Law art. 15, par. 2), namely that if a foreign husband acquires German nationality after the marriage or if foreign spouses establish their domicile in Germany, they are allowed to contract a marriage settle-

retain their regime established in Switzerland, except when the foreign law opposes it.)

¹²² Trib. civ. Versailles (May 15, 1924) with the conclusions of Counsellor Brachet, affirmed by Cour Paris (Oct. 17, 1924) *Revue* 1925, 240, 254. Easier to decide to the same effect was the case of Trib. civ. Seine (Jan. 17, 1924) *Revue* 1925, 226 (incommutability and indivisibility of the property separation of a naturalized American, former Frenchman, domiciled with his wife first in New York and then in France).

¹²³ RG. (March 9, 1900) 10 *Z.int.R.* (1900) 281; RG. (Sept. 25, 1903) 13 *Z.int.R.* (1903) 587. ANZILOTTI, *Sui mutamenti dei rapporti patrimoniali fra coniugi nel diritto internazionale privato* (Firenze, 1899) 121.

ment, even if no such agreement would be permitted by their former personal law.¹²⁴

The Hague Convention on Marriage Effects accepts this result in the case where both spouses acquire a new common nationality,¹²⁵ but not where there is only a change of domicile¹²⁶ nor where the husband alone changes his nationality. The more sweeping German statute has aroused much criticism,¹²⁷ which is justified in the case where the husband alone becomes a German national after marriage.

In the case where both parties change their status, it has been argued that a former personal law that allows them to modify their regime during coverture, invests them with a right effective after the parties leave its orbit, whereas, if it prohibits such modification, the prior law ceases to have a legitimate role.¹²⁸ This last argument suffices to prove that the solution of the question should be reserved to the new personal law. Various writers have suggested that, in the event of a change of personal law, the parties should be allowed to adapt their property relations to their new legal surroundings, irrespective of the municipal law of the first state and the

¹²⁴ Followed by Poland: Law of 1926 on international private law, art. 14 par. 2.

Italy: C. C. (1942) Disp. Prel. art. 19 par. 2.

Nicaragua: C. C. art. 105.

Swiss writers have inferred from NAG. art. 20 a similar right of French parties to conclude a postnuptial settlement in Switzerland against the national law. See STAUFFER, NAG. 102 n. 49.

¹²⁵ Art. 9 par. 1 with art. 4 par. 1.

Sweden: Law of June 1, 1912, § 1 no. 9.

¹²⁶ KG. (Feb. 26, 1925) Z. des Deutschen Notarvereins 1927, 58 (settlement concluded by Dutchmen after having established themselves in Germany void). This restriction by the Convention of the rule of EG. art. 15 par. 2 is approved by LEWALD, 103 no. 144, and others. *Contra*: under EG. art. 15 par. 2, the KG. (June 23, 1932) HRR. 1933, no. 205, recognized a settlement by Swiss nationals who had established their second domicile in Germany, whereby they agreed to a system of separate property in accordance with the German Code but not in accordance with Swiss C. C. art. 179 par. 2.

¹²⁷ 2 ZITELMANN 741 n. 401; NEUMEYER, IPR. (ed. 1) 20; KOSTERS 468; LEWALD 103 no. 144; 3 FRANKENSTEIN 310ff. who overrates the nationality principle.

¹²⁸ KOSTERS 454.

general conflicts rule of the second state.¹²⁹ Louisiana has instituted such an exception to its otherwise rigid rule of immutability.¹³⁰

The draft proposed by the French *Société d'études législatives* provides that if the marital property was not governed by French law and if both parties are of French nationality, either by naturalization or reintegration—viz., of both, or of the party not a French national—they may adopt a settlement accepting a regime within a year.¹³¹ Under the recent Brazilian law, a party who is naturalized may require, with the consent of the other, that the judicial decree of his naturalization should state the acceptance of the Brazilian regime of general community property saving (acquired?) rights of third persons.¹³²

5. Classification

The classification of the problem of mutability is theoretically easy; there can be no doubt that it belongs to the field of effects of marriage on property.¹³³ Most French writers, however, think that immutability in French law implies a certain incapacity, characteristic of the French regime, which therefore, concerns status and as such is dependent on the national law.¹³⁴ Nevertheless, the French courts¹³⁵ place the

¹²⁹ Switzerland: NAG. arts. 20, 32, 36b.

Italy: ANZILOTTI, *op. cit. supra* n. 123, at 65; DIENA, 2 Princ. 153ff.; FEDOZZI 453.

¹³⁰ La. Rev. Civ. C. Ann. (1932) art. 2329, as amended by Act No. 236 of 1910.

¹³¹ Bull. Soc. d'Études Lég. 1930, 175ff., art. 21; *cf. ibid.* 1928, 319ff. at 339ff. According to art. 26 as proposed by the French regime replacing a foreign system, has an effect retroactive to the day of marriage, this is, however, without prejudice to the rights acquired by third persons and the validity of regularly performed acts of the spouses.

¹³² Brazil: Introductory Law (1942) art. 7 § 5.

¹³³ To this effect in France, BATIFFOL, *Revue Crit.* 1934, 641.

¹³⁴ 2 ARMINJON 465 no. 218; BARTIN, 2 Principes 143 § 271; NIBOYET no. 710; VALÉRY 1096 no. 768; AUDINET 474 no. 589; CALEB in 4 Répert. 199 no. 192ff.; SAVATIER, D. 1936.1.7, 10. But LEREBOURS-PIGEONNIÈRE 402 no. 340 advocates the *lex loci actus*.

¹³⁵ Cour Montpellier (April 25, 1844) D.1845.2.36; Cass. (req.) (June 4, 1935) D.1936.1.7, Clunet 1936, 898, *Revue Crit.* 1936, 755, annotated by

problem in the category of the *régime matrimonial* in a peculiar way. The Court of Cassation, in adopting the classification, emphasized as decisive the unity of the marital property law (*régime légal*),¹³⁶ meaning thereby that parties who have once come to live under the French system of *communauté légale* are bound by it irrevocably, regardless of whether they are of French nationality. Parties, however, who have chosen or who are subjected to a foreign regime, may change to the French community system whenever such change is permitted by their first personal law.¹³⁷

Fortunately, no such queer controversy exists in any other country.

6. Renvoi

The renvoi problem is resolved by including in the governing law the conflicts rule respecting variability. For instance, two Americans, who have not made a marriage settlement, establish their domicile first in the United States and then in Germany. According to the American rule (Restatement § 290), on the one hand, newly acquired movables would be considered subject to the German system of community of administration. Under the German conflicts rule, on the other hand, the common law system of the first domicile would continue to apply to all property. The German matrimonial law will be applied, however, because its application is induced by the American rule of conflict of laws.

7. Rationale

Apart from the antiquated historical reasons that have influenced French developments, the invariability of the governing law has been explained as being required by the theory of

BASDEVANT, *ibid.* 761; Trib. civ. Toulouse (June 8, 1938) *Revue Crit.* 1939, 105. *Contra*: Trib. civ. Strassburg (July 24, 1935) *Clunet* 1937, 320.

¹³⁶ Report of Counsellor Pilon, Cass. (req.) (June 4, 1935) D.1936.1.7, cited *supra*, n. 135.

¹³⁷ This is hailed by LEREBOURS-PIGEONNIÈRE 402 no. 340.

vested rights,¹³⁸ by the alleged function of the law first applying to give a definitive solution,¹³⁹ by the need of the wife to be protected against arbitrary changes,¹⁴⁰ and by other arguments equally weak. From a rational standpoint, there is only one reason for avoiding a radical change in the regime, the danger of confusion and unworkability in maintaining two heterogeneous systems at the same time, a danger illustrated under the American rules pursuant to which a former regime partially survives with respect to movables acquired before the change of domicil or replaced at any time, and makes itself felt in other ways.

These difficulties, it is true, seem not to have attracted much attention in this country. For some unknown reason, cases dealing with the topic are relatively few.

On the other hand, the permanence of property relations, more completely adopted in Europe than in this country, raises problems in connection with other conflicts rules. While the law governing marital property is fixed on the day of the marriage or of acquisition, the law controlling succession to the estate of a predeceasing spouse depends on his nationality or domicil as of the day of his death, and the law governing the personal relations between the spouses admittedly changes with every change of domicil or nationality. In every municipal legislation, these three matters are to a certain degree co-ordinated. Their harmony may be greatly disturbed by combining in the applicable laws two or more divergent principles, one for marital property, a second for personal relations, and a third for succession upon death. Difficult problems of charac-

¹³⁸ In connection with an assumed implied contract, a vested right (*jus adquisitum*) was at the base of the Prussian Allgemeine Landrecht; see Prussian Obertribunal (March 11, 1873) 69 Entsch. kgl. Ob. Trib. 101. Among the modern writers see PILLET, *Principes* 521 no. 289; DIENA "La conception du droit international privé d'après la doctrine et la pratique en Italie," 17 *Recueil* 1927 II 343, at 416; RAAPE 304; WIERUSZOWSKI, 4 *Leske-Loewenfeld* I 64 n. 373.

¹³⁹ 1 *BAR* § 184; KOSTERS 453.

¹⁴⁰ 1 *BAR*, *loc. cit.*; WEISS, 3 *Traité* 647.

terization, much discussed in recent literature, result.¹⁴¹ Those regarding the relation between marital property and inheritance law will be illustrated hereafter.

The position of third states is particularly delicate. In this country, an acquisition by an Italian married couple, after emigration to the United States, will be treated according to the law of the state where the parties establish themselves. Italian courts, however, hold that Italian matrimonial law continues to govern in every respect. What should be done by a court in Cuba or France? Under the nationality principle there in force, these two countries generally agree with the Italian conception, although such a decision seems ill-advised.¹⁴²

The circumstance, finally, that the German doctrine has adopted the principle of mutability in the related field of paternal rights in the property of a minor child,¹⁴³ further suggests that all existing rules are unsatisfactory and that entirely new methods should be devised.

V. MARRIAGE SETTLEMENTS

1. Characterization

What agreements are covered by the rules dealing with marriage settlements, is in practice only to be ascertained by comparative law.¹⁴⁴

2. Permissibility

In the United States, the ordinary rule respecting contracts is applied to antenuptial agreements. Hence, the Restatement declares applicable the law of the place of contracting.¹⁴⁵ The

¹⁴¹ Doubt of the advisability of the principle on this ground has been considered by NEUNER, *Der Sinn* 67, 68.

¹⁴² Cf. 3 FRANKENSTEIN 307.

¹⁴³ See *infra*, pp. 558, 606-607.

¹⁴⁴ RABEL, 5 *Z.ausl.PR.* (1931) 261 and 283; JOELSON, *op. cit. supra* n. 1.

¹⁴⁵ Restatement § 238 comment b, § 289 comment c, should be read with a view to the criticism by STUMBERG 288, 289 referring to *Hutchison v. Ross* (1933) 262 N. Y. 381, 187 N. E. 65.

Argentine Civil Code states the same rule.¹⁴⁶ This place, however, may easily coincide with that of the first marital domicile.¹⁴⁷

Generally, the conditions under which a marriage settlement is permitted are determined, in the absence of an antenuptial agreement, by the law governing the marital property. This law decides questions such as are incident to the English doctrine of freedom of contract, to the Italian provisions that the parties may choose only between narrowly defined regimes¹⁴⁸ (viz., the dowry system or the community of gains), or to the German provision that the parties, unless the husband is domiciled abroad, may not, merely by referring to the foreign law and without expressly stating its rules, incorporate a foreign regime in their contract.¹⁴⁹ The same law also controls the question whether the parties may insert clauses in

¹⁴⁶ Argentine C. C. arts. 1220 (new 1254), 1205 (new 1239); cf. 2 VICO 48 no. 69, *ibid.* 50 no. 72; Cám. civ. 1 Cap. (June 27, 1941) J. A. 1942. I 926, 937 (explains in a learned comment that the restrictions on community property settlements do not apply to foreign-concluded contracts).

The Brazilian C. C. of 1916, Introduction art. 8 provided that the spouses may choose the Brazilian law. On this unfortunate addition proposed by the Senate and approved by the House of Representatives, which has been called mysterious, see BEVILAQUA, 6 Répert. 168ff. no. 50.

¹⁴⁷ See, for instance, *Le Breton v. Miles* (N. Y. 1840) 8 Paige 261 (intended domicile in France); *Spears v. Shropshire* (1856) 11 La. Ann. 559, 66 Am. Dec. 206; *Davenport v. Karnes* (1873) 70 Ill. 465; *Mueller v. Mueller* (1899) 127 Ala. 356, 28 So. 465.

¹⁴⁸ Italy: C. C. (1865) art. 1381; C. C. (1942) art. 161.

Spain: C. C. art. 1317.

The Netherlands: BW. art. 198, contrary to French law, see PLANIOL, RIPERT, et NAST, 1 Rég. Matr. 47 no. 36.

¹⁴⁹ BGB. § 1433, followed by Italian C. C. (1942) art. 161. Germans in Belgium may by virtue of § 1433 choose the Belgian community of gains, RG. (March 16, 1938) 92 Seuff. Arch. no. 96, JW. 1938, 1718. The Reichsgericht even extended this benefit to Germans simultaneously citizens of another state, beyond the limits of § 1433 par. 2, RG. (March 13, 1924) Leipz. Z. 1924, 741.

Contra: the Hooze Raad (June 24, 1898) W. 7141; H. R. (Jan. 14, 1926) W. 11459, and KOSTERS 447, have seen in a similar Dutch provision, BW. art. 198, a rule on formalities not binding Dutch subjects abroad; but see the criticism by HIJMANS 108; OFFERHAUS, Gedenkboek 1838-1938, 707.

An old decision of Louisiana, *Bourcier v. Lanusse* (1815) 3 Mart. O. S. 581 held that the submission of the parties to the coutume of Paris was invalid, the C. C. of Louisiana not permitting parties to choose a law other than of a state of the union.

favor of third persons or provisions looking to the death of one of them.

The law meant here is, of course, the law of the husband's or of the matrimonial domicil in certain countries and the national law of the parties in the great majority of civil law countries.

In both systems, the validity of the settlement is suspended until the celebration of the marriage. In England, the applicable law is considered to be that intended by the parties, which, only by rebuttable presumption, is identified as that of the matrimonial domicil.

The French courts again have developed a contrary view. Where two Italians marrying in France stipulate universal community of assets, the contract is prohibited and void in Italy but has been held valid in France, either by application of the law of the situs or nowadays generally under the doctrine of implied contract.¹⁵⁰

On principle, an antenuptial agreement made by foreign immigrants before coming to this country will be recognized in the United States.¹⁵¹ But they cannot be sure that a settlement validly made here will be recognized in their homeland.

3. Formalities

The rule *locus regit actum* governs the formalities of marriage settlements. For this particular subject matter, it is recognized also in England that this rule as generally understood is optional, that is, it applies in case of noncompliance with the formalities of the proper law.¹⁵²

¹⁵⁰ See Cass. (req.) (May 7, 1924) Revue 1924, 406 and 2 ARMINJON, ed. 1, 463, ed. 2, n. 2.

Cf. Italian C. C. (1865) art. 1433.

¹⁵¹ See, however, *infra* n. 156.

¹⁵² Sir John Romilly in *Van Grutten v. Digby* (1862) 31 Beav. 561, *In re* Banks, *Reynolds v. Ellis* [1902] 2 Ch. 333 per Buckley, J.; *In re* Barnard, *Barnard v. White* (1887) 56 L.T.R. 9 per Kay, J.; *In re* Fitzgerald, *Surman v. Fitzgerald* [1904] 1 Ch. 573; cf. WRIGHT, "A Problem of Conflicting Marriage Settlements," 44 Law Q. Rev. (1928) 85, 93; CHESHIRE 498.

The Hague Convention on the Effects of Marriage, article 6, has adopted some peculiar provisions; either the *lex loci actus* or both national laws of the parties must be observed.

4. Capacity

It is generally held outside the United States that capacity to contract an antenuptial agreement is entirely distinguishable from capacity as envisaged under the personal or the property law relations of husband and wife. In the common assumption, it is not affected by the marriage but flows from the general status rights of the party. Therefore, capacity to enter into a marriage settlement before marriage is governed by the law of the domicile or nationality of the party at the time when the agreement is made, the same as the capacity of an unmarried person to make any other kind of contract.

However, in disagreement with this view, the Hague Convention on the Effects of Marriage (art. 3) has referred to the national law at the time of the marriage rather than that of the contract. By a remarkable coincidence, the English writer Cheshire suggests that on principle the law of the matrimonial domicile should prevail.¹⁵³ Although his main impulse derives from his peculiar proposal to extend the marital law to capacity to marry, it may be argued on another ground that the marital law governing the objective permissibility of settlements should likewise cover their subjective requirements.

Nevertheless, in recent times, the dominant opinion has been well supported by the emphasis laid on the independence of married women. If the wife retains her own personal law during the marriage, her status deserves to be respected in the case of postnuptial settlements—in accordance with their basic significance—and the more so in the case of contracts preceding the marriage.

¹⁵³ CHESHIRE 235. Other suggestions are made by MORRIS, "Capacity to Make a Marriage Settlement Contract in English Private International Law," 54 Law Q. Rev. (1938) 78, 86.

5. Mutability

The right to alter the property regime during coverture is determined in the same way as in the absence of a settlement. The very origins of the doctrine of immutability in France were connected with antenuptial agreements. Because the property of spouses was supposed to be governed by such an agreement for the whole duration of their union in all jurisdictions, tacit agreements were implied. The doctrine was applied in England in the case of a French marriage¹⁵⁴ and is used in Canada in the analogous case of a contract made or a marriage celebrated without express settlement in Quebec.¹⁵⁵

Also, the American courts basically consider express marriage settlements to be valid and unaffected by any change of status. But they have construed some agreements as intended solely to cover property owned at the time of the marriage or acquired while the parties resided at their first conjugal domicil.¹⁵⁶ This was done particularly in the case of immigrants who had settled their matrimonial property in the old country without contemplating emigration. A certain tendency in favor of such a presumption may still be observed,¹⁵⁷ sometimes subject to question. According to the English and Continental point of view, a settlement applies to all assets of the parties wherever and whenever acquired. This interpretation is certainly convincing, where change by postnuptial agreement

¹⁵⁴ *De Nicols v. Culier* [1900] A. C. 21 regarding movables; *In re De Nicols, De Nicols v. Culier* [1900] 2 Ch. 410 with regard to immovables (implied French contract was held enforceable against property in England).

¹⁵⁵ See *supra* n. 65.

¹⁵⁶ *Long v. Hess* (1895) 154 Ill. 482, 40 N. E. 335 (the parties having immigrated many years ago; their settlement made in the grand duchy of Hesse was declared not binding); *Castro v. Illies* (1858) 22 Tex. 479, 73 Am. Dec. 277; *Fuss v. Fuss* (1869) 24 Wis. 256. More recently, *Hoefer v. Probasco* (1921) 80 Okla. 261, 196 Pac. 138 (avoiding by mere construction of the intention of the parties for clear equitable reasons the interference of the agreement to a homestead acquired in a new domicil).

¹⁵⁷ See the statement of the writers: 2 BEALE 1015; LEFLAR, "Community Property and Conflict of Laws," 21 Cal. L. Rev. (1933) 221, 224; GOODRICH 333 n. 40. Cf. NEUNER, 5 La. L. Rev. (1943) 167, 185, *supra* n. 1.

after change of status is permitted and there is actually no new settlement.

This contrast and the conflict of policy behind it are sharply illustrated by the well-known case of *Hutchison v. Ross*,¹⁵⁸ where the higher New York courts applied the *lex situs* to give effect to transactions between spouses who were continuously domiciled in Quebec and lived under a marriage covenant of property separation, immutable under the law of Quebec. This leading case in conflict of laws on trusts has been considered a violation of the marital law of the domicile, and the lawyers of Quebec resented the Appellate Division's¹⁵⁹ interpreting the covenant as not intended to bind the spouses during their whole marriage or to subject them definitely to the law of Quebec, a construction which has been called fantastic.¹⁶⁰

6. Settlements Concerning Immovables

The Restatement declares that settlements concerning immovables are to be construed in accordance with the law of the situs, excepting the validity of the contract.¹⁶¹ This statement has been criticized as too broad,¹⁶² but it is misleading as a whole unless it is remembered that the Restatement recognizes renvoi from the *lex situs* (§ 8, (1)). The "*lex situs*" in this case simply consists of a conflicts rule common to all jurisdictions of this country. First, the validity of the contract is ascertained according to the law of the place of contracting or whatever law is deemed to be applicable thereto. Second, under another conflicts rule which is not more "*lex situs*" than the first, the

¹⁵⁸ *Hutchison v. Ross* (1933) 262 N. Y. 381, 187 N. E. 65, Annotation, 89 A.L.R. 1023.

¹⁵⁹ *Ross v. Ross* (1931) 233 App. Div. 626, 253 N. Y. Supp. 871. The argument was not adopted by the Court of Appeals (see note 158, *supra*).

¹⁶⁰ 1 JOHNSON 449, Appendix (devoted to the case).

¹⁶¹ Restatement §§ 237, 238 comment b; 2 BEALE § 238.2.

¹⁶² NEUNER, 5 La. L. Rev. (1943) 184, *supra* n. 1, explains that the first part of the rule is too broad.

agreement is recognized as having full effect in the state of the immovable, unless a particular public policy is offended, and likewise is to be recognized in all third states. An antenuptial contract concluded between residents of Nebraska in that state is applicable, beyond any doubt, "to real property situated in Kansas owned by the husband at the time of his death," in accordance with "the general rule that antenuptial agreements, equably and fairly made are valid and enforceable."¹⁶³

In the great majority of countries, this result is unchallenged, on the premise that immovables and movables are parts of a unit.

7. Obligatory Settlements

An interesting experiment has been made in Guatemala, where a marriage settlement in the form of a public instrument must be executed when an alien or naturalized bridegroom intends to marry a Guatemalan woman.¹⁶⁴ European authors have suggested similar measures for aliens marrying in the country or foreign married couples acquiring citizenship.¹⁶⁵ Many uncertainties would be avoided by some cautious pressure in this direction.

VI. PROTECTION OF THIRD PARTIES

Opinion is strongly divided concerning the advisability and means of protecting third parties. While, according to the older conception, the personal law could be invoked against everyone, in recent times protection of third parties within the jurisdiction results from the system of territoriality or from exceptions to the rule of the personal law.

¹⁶³ *Sanger v. Sanger* (1931) 132 Kan. 596, 296 Pac. 355, 356.

¹⁶⁴ Guatemala: Law of Foreigners (1936) art. 41; C. C. (1933) art. 100 no. 4; cf. MATOS 356 no. 241.

¹⁶⁵ See authors cited *supra* n. 88. See, in particular, the detailed requests that marriage officers should address to the parties, as proposed by ROGUIN at the Hague Conference of 1900, Actes de la Troisième Conférence de la Haye (1900) 231.

1. No Exception to the Personal Law

No exception to the application of the personal law is granted to third parties in France, Poland, and a few other countries. French courts, when they actually recognize that foreign law governs the property regime, consider it the duty of anyone dealing with the husband or wife to inform himself about the legal background.¹⁶⁶

2. Exception with Respect to Third Persons

Conversely, in a system historically rooted,¹⁶⁷ Swiss law distinguishes sharply between the relations of husband and wife to each other and their relations with third persons. Irrespective of the law applying to the former, the latter are governed by the matrimonial law of the conjugal domicile, which determines especially the legal position of the wife in relation to the husband's creditors in the case of his bankruptcy or of an execution levied upon his property.¹⁶⁸ This proposition sounds attractive, but its application is complicated¹⁶⁹ and, as the Swiss Federal Tribunal itself was compelled to admit, results in certain curious consequences.¹⁷⁰ It was criticized by Meili as early as 1902.¹⁷¹

The *Código Bustamante* declares in article 189 that the forum's provisions on the effects of marriage as respects third

¹⁶⁶ Trib. civ. Seine (May 29, 1901) Clunet 1902, 361. For Greece see MARIDAKIS, 11 Zausl.Pr. (1937) 122.

¹⁶⁷ See in particular Prussian Allg. Landrecht, II Tit. 1 §§ 351, 352 declaring the law of the first domicile immutable except in relation to third persons. The code referred only to the case where married persons, without a marriage settlement, move from a country of separate property to another of community property, but the courts extended the rule to the converse case; see Obertribunal (March 28, 1846) 13 Entsch. kgl. Ob. Trib. 297 no. 24 where it is stated that the continuance of the original regime should not harm third parties acting in good faith.

¹⁶⁸ NAG. art. 19 par. 2.

¹⁶⁹ SCHNITZER 194ff.; HUBER-MUTZNER 469ff.; BG. (July 10, 1907) 33 BGE. I 617, 622; BG. (July 14, 1909) 35 BGE. II 463, 470; BG. (Dec. 10, 1910) 36 BGE. II 616, 618; BG. (Oct. 17, 1918) 44 BGE. II 333.

¹⁷⁰ BG. (July 11, 1929) 55 BGE. III 732; cf. also BG. (Dec. 17, 1908) 34 BGE. I 734, 737.

¹⁷¹ I MEILI § 75; see JOELSON, *op. cit. supra* n. 1, at 108-116.

persons belong to the sphere of public policy of the forum, i.e., that they apply even where a foreign personal matrimonial law otherwise governs.

3. Exception in Favor of Third Persons in Good Faith

Under the German provisions, a person may rely on the results of German matrimonial law when he contracts with a married foreigner domiciled in Germany, if he is ignorant of the fact that the spouses are governed by some foreign regime and this fact is not recorded in Germany in the proper public register; likewise a married woman who carries on an independent business enterprise in Germany with the consent of her husband is purported to have capacity as under German law,¹⁷² although she may otherwise be governed by a foreign regime.

Illustration: Suppose an American married couple domiciled in Germany. Nothing has been entered in the public record respecting matrimonial property rights. The husband sold a crop of grain owned by his wife to a buyer who was ignorant of the fact that the husband and wife were living under the American system of separation of assets, under which, contrary to the German law, the husband had no power to sell and transfer his wife's crop. The German rule granting the husband such power is to be applied.

Other countries also prescribe that a foreign regime must be publicly recorded¹⁷³ and establish consequences for the parties' failure to do so.

In effect, the German system is not much different from the Swiss, because parties living under a foreign system of

¹⁷² EG. art. 16, art. 36 par. 1. Also the German presumptions of ownership of the husband (*praesumptio Muciana*) and of the wife (§ 1362 BGB.) are declared applicable if they are more favorable to the third party, EG. art. 16 par. 2.

¹⁷³ Switzerland: Justice Dept. Oct. 25, 1933, see 11 Zausl.PR. (1937) 658.
Sweden: Law of June 1, 1912, § 2.

Denmark: see HOECK, Personalstatut 30.

Costa Rica: C. C. art. 75 par. 2, and Nicaragua: C. C. art. 154, which prescribe that changes of regime must be recorded in the appropriate registers to be effective against third parties, may be applicable by analogy.

matrimonial property law very rarely take the trouble to have this fact recorded.

The international relation between these two systems has been described by the Swiss Department of Justice,¹⁷⁴ to the effect that a Swiss married couple living in Germany have to observe the German prescriptions of registration to make their marriage settlement effective, even in cases where otherwise Swiss law would be applicable under the conflicts rule of the court. Thus, a Swiss national domiciled in Switzerland, who contracts with a Swiss husband or wife domiciled in Germany, must inform himself concerning the property system valid in Germany. In addition, Swiss legislation has given such spouses opportunity to publish their property regime with the registrar of their home canton, effective for transactions in Switzerland.

In the United States, no particular provisions exist for such protection. Sometimes it has been assumed that the application of the *lex situs* to the marital property in immovables has the purpose of giving third parties the legal position they are likely to suppose,¹⁷⁵ or that, for the benefit of a bona fide purchaser or a creditor, movables are occasionally treated as if they were not brought from a former domicile.¹⁷⁶ But the cases do not seem to give such assumptions any considerable support.

VII. QUESTIONS OF CLASSIFICATION

I. Composition of Community Property

Two cases of the German Reichsgericht undertake to determine whether the community fund includes certain rights which taken by themselves are governed by a law other than that of the community property. In the first case, German parties were married under a German contract of community of

¹⁷⁴ See 29 SJZ. (1932-33) 25 no. 18.

¹⁷⁵ See NEUNER, 5 La. L. Rev. (1943) 172, *supra* n. 1.

¹⁷⁶ HARDING, "Matrimonial Domicil and Marital Rights in Movables," 30 Mich. L. Rev. (1932) 859; LEFLAR, 21 Cal. L. Rev. (1933) 235, *supra* n. 1; NEUNER, 5 La. L. Rev. (1943) 180 and n. 49, *supra* n. 1.

acquests. The wife having acquired a tort claim under Belgian law, the court properly applied German matrimonial law to the problem whether the claim belonged to the community. But the preliminary problem whether the claim was alienable, so that it could fall into the community fund, should have been decided under Belgian law.¹⁷⁷

In the second case, German spouses, living abroad, had validly settled their community regime under Belgian law. In the proceedings for partition of the community fund, the question arose whether the rights of the husband in a German partnership were a part of the community fund. The court correctly inquired into the alienability of the right, applying the German law governing the partnership and deciding that the right was not alienable in the precise sense in which alienability is required in the Belgian and French law of community property.¹⁷⁸

A comparable case in this country is where the husband buys a chattel outside the domiciliary state. Thus, in *Snyder v. Stringer*,¹⁷⁹ the husband, domiciled in Washington, acquired an automobile in Iowa with earnings made in Montana and Iowa. Under the laws of these two states, the earnings and the automobile purchased therewith would have been acquired as the husband's separate property, but they were deemed to be community property by the law of the domiciliary state, Washington.

2. Marital Property and Inheritance

(a) *Importance of defining limits of each field.* To draw the proper line of demarcation between marital property law and the law of succession upon death is important in defining

¹⁷⁷ RG. (May 30, 1919) 96 RGZ. 96. Comments in various sense by MELCHIOR 187; RAAPE 309; 3 FRANKENSTEIN 400 n. 52.

¹⁷⁸ RG. (March 16, 1938) JW. 1938, 1718. For another interpretation ROBERTSON, *Characterization* 152 n. 60.

¹⁷⁹ (1921) 116 Wash. 131, 198 Pac. 733; cf. LEFLAR, 21 Cal. L. Rev. (1933) 232, *supra* n. 1.

the scope of conflicts rules.¹⁸⁰ In the United States, Great Britain, and Argentina, the law governing movable marital property is determined differently from that governing inheritance of movables; in most countries, the difference also includes the rules on immovables.

It has been asked, for instance, in England whether the English rule that a will is revoked by marriage is to be classified as a rule of matrimonial or testamentary law. As the rule has been held to be essentially connected with the marriage relationship,¹⁸¹ its effect is measured by the law of the matrimonial domicile, "i.e. in most cases by the *lex domicilii* of the husband at the time of marriage,"¹⁸² rather than by the *lex domicilii* of the testator at the time of his death. This reasoning is unsound, and the decision ought to be overruled.¹⁸³

Many international treaties contain special clauses providing rules for the distribution of estates upon death. For instance, one of the oldest bilateral treaties on jurisdiction, that between France and Switzerland of 1869,¹⁸⁴ provides that the assets of a Frenchman or a Swiss dying within the territory of the other country should be distributed by the court and under the law of his last domicile in his home country. The Swiss Federal Tribunal held in a recent case that the question whether certain assets belonged to the wife's separate property or to the acquisitions of marriage is a matter of marital law and does not come within the treaty.¹⁸⁵

¹⁸⁰ Cf. particularly, BARTIN, *Études* 5, 68; SILBERSCHMIDT, 3 *Z.int.R.* (1893) 132 at 143, 8 *Z.int.R.* (1898) 97 at 109, 48 *Z.int.R.* (1933) 313; RABEL, 5 *Z.ausl.PR.* (1931) 283; NEUNER, *Der Sinn* (1932) 60ff. and in 5 *La. L. Rev.* (1943) 167 at 186, *supra* n. 1; M. WOLFF, *IPR.* 37; BECKETT, "The Question of Classification ('Qualification') in Private International Law," 15 *Brit. Year Book Int. Law* (1934) 46; cf. also ROBERTSON, *Characterization* 158-168.

¹⁸¹ Vaughan Williams, L. J., in the case of *In re Martin*, *Loustalan v. Loustalan* [1900] P. 211, 240. Cf. CHESHIRE 523.

¹⁸² CHESHIRE 523.

¹⁸³ FALCONBRIDGE, 15 *Can. B. Rev.* (1937) 227-230, *supra* n. 108.

¹⁸⁴ Treaty on the jurisdiction and execution of judgments in matters of private law of June 15, 1869, art. 5 par. 1.

¹⁸⁵ BG. (Dec. 4, 1936) 62 BGE. I 235, *Praxis* 1937, 61.

The two fields of marital property and inheritance are not separated in the systems of municipal law by a uniform or invariably clear line. This fact has given rise to various useless theories that have greatly overburdened the so-called problem of characterization. The only acceptable method of treatment has proved to be that based on general principles. Repeated comparative research has revealed a basic criterion that more or less obviously underlies all legislations, namely, that matrimonial law determines the interests of husband and wife during the marriage, including the specification of the assets of either spouse on the dissolution of their conjugal life. In the event of one spouse's predeceasing the other, the law of inheritance regulates the distribution of those assets which belonged to the deceased in accordance with the matrimonial law. This distribution is particularly significant where the matrimonial regime is a community property system. On the death of one spouse, two partitions take place, either actually or at least for the purposes of an accounting or a fictitious liquidation. First, all property of husband and wife is examined to ascertain what constitutes the community fund and which part of it continues to be owned by the surviving spouse, while the other part, together with the predeceased spouse's separate estate, forms the inheritance. Second, administration and distribution of the assets designated by the matrimonial law as the separate property and the part of the community fund belonging to the deceased, are governed by the law of inheritance according to the will or the rules of intestacy, as the case may be.¹⁸⁶

This distinction is adequate to satisfy the theoretical needs of all legislations and therefore to serve the needs of international application as required by the law of conflicts. Of course, the distinction is so general that it leaves occasional

¹⁸⁶ See ROGUIN, *Droit civil comparé, Régime matrimonial* (1905) 9; KADEN, "Eheliches Güterrecht," 2 *Rechtsvergl. Handwörterb.* 705. Cf. also FALCONBRIDGE, "Characterization in the Conflict of Laws," 53 *Law Q. Rev.* (1937) 537, 540.

doubts as to classification. In fact, in determining which rule of conflicts is applicable, uncertainty may arise from two sources. On the one hand, some municipal systems have institutions of mixed or obscure character. On the other hand, marital and inheritance regulations, forming integral parts of municipal legal systems, should logically be applied concurrently, and not separately as necessitated by the dictates of two different conflicts rules. We must explain these two difficulties.

(b) *Rights and expectancies distinguished.* Ordinarily, interests in assets of one spouse, which by marital law or marriage settlement have been conferred upon the other, come into being or, in the usual language, acquire the quality of vested rights before the dissolution of the marriage. At common law, for instance, a wife by virtue of the marriage has a dower interest in every parcel of real estate of which her husband has been seised at any time during coverture. This interest can be defeated neither by a conveyance of the husband nor by his will. On the other hand, where testamentary or intestate succession entitles a surviving spouse to participate in the distribution of the predeceased spouse's estate, the surviving spouse receives no more than a mere expectation, strengthened at the most by provisions for forced shares; *vivente hereditas non datur*.

It follows that where a legal system grants to a spouse a genuine right to be acquired upon and during the marriage, this right is always to be classified as matrimonial. Such a right will therefore be acquired under the applicable matrimonial law, irrespective of the inheritance law of the last domicile or the last nationality. By a marriage settlement, in England, "the law of the testator's domicile may be ousted from its regulation of a will."¹⁸⁷ In this country, much discussion has centered around the question whether, in all ten of the community

¹⁸⁷ BENTWICH, *The Law of Domicil in its Relation to Succession* (London, 1911) 133ff.

property states, the wife has a present interest in the community fund during the marriage, sufficient for a separate income tax return.¹⁸⁸ There seems to be a growing tendency to affirm the existence of an actual right for all purposes.¹⁸⁹ In France, Germany, Switzerland, as well as in the Latin American countries, all regimes, except that of complete property separation, undoubtedly give actual rights during marriage. Antenuptial or valid postnuptial settlements have a clear precedence over intestate distribution also in this country.¹⁹⁰

Where, conversely, a right of a spouse is recognized as existent only at the time of the dissolution of marriage, the right by no means necessarily originates in the law of inheritance. Death of one spouse is ordinarily only one of several possible causes of dissolution and the regimes that are usually called systems of community upon death are in reality meant to confer some interest also in cases other than death.¹⁹¹ For this reason alone, such systems cannot be characterized as constituting successions on death. Moreover, although the nature of the benefits granted to a surviving wife is uncertain in such systems, analyses undertaken in recent years for the purpose of applying conflicts rules have shown that in almost all such institutions the widow is entitled to an interest upon marriage rather than upon inheritance.¹⁹²

Still, some legislations contain veritable mixtures of elements which resist satisfactory classification. Thus, certain

¹⁸⁸ See DAGGETT, "Wife's Interest in Community Property," *Legal Essays* (1935) 101ff. For the construction of the law of Idaho see JACOB, "The Law of Community Property in Idaho," 1 *Idaho L. J.* (1931) 1, 25.

¹⁸⁹ See STUMBERG, 11 *Tex. L. Rev.* (1932) 53, 65 n. 50, *supra* n. 1; DAGGETT, "Division of Property upon Dissolution of Marriage," 6 *Law and Cont. Probl.* (1939) 225, 233.

¹⁹⁰ *Ford's Curator v. Ford* (1824) 2 *Mart. N. S. (La.)* 574; *Estate of J. B. Aubichon* (1874) 49 *Cal.* 18.

¹⁹¹ KADEN, 4 *Rechtsvergl. Handwörterb.* 1.

¹⁹² The Austrian community on death is to be classified with matrimonial law; see RABEL, 5 *Z.ausl.PR.* (1931) 261; likewise the Danish community of goods, see PAPPENHEIM, 6 *Z.ausl.PR.* (1932) 120; and the Hungarian community of gains, see ALMÁSI, 1 *Ungarisches Privatrecht* (Berlin, 1922) 197ff., RAAPE 344.

An interesting example of a matrimonial institution clearly preserved from ancient ideas is the continued community property of the German Code (§§ 1483

American institutions of mixed character, such as the widow's right of election between dower rights and testamentary bequests under the law of Pennsylvania,¹⁹³ or between dower and intestate share in Florida,¹⁹⁴ or between statutory portion and legacy under New York law,¹⁹⁵ have been objects of discussion in the European conflict of laws.

The name that an institution bears in its legislative home country cannot be decisive. Nor should the law of the forum influence the analysis of foreign institutions.¹⁹⁶

(c) *Coordination of the two fields in municipal legislation.* In some municipal laws, the connection between the matrimonial property law and the law of inheritance is particularly strong. Recent authors have drawn attention to the purposeful balancing of provisions in the two fields, disregard of which has caused unfortunate results.

—1518), by which the community which existed between the spouses is continued after the death of one spouse between the survivor and the children of the marriage. The children step into the place of the predeceasing parent through the operation of marital law rather than the rules of inheritance. See RG. (Oct. 25, 1895) 36 RGZ. 331, 334. Hence, German courts and other courts having a similar set of conflicts rules apply the said provisions whenever the husband was a German national at the time of the marriage. 2 ZITELMANN 694; RAAPE 343; KADEN, 3 Rechtsvergl. Handwörterb. 500; *contra*: 3 FRANKENSTEIN 391.

In Switzerland, an exactly analogous characterization of the existing continued community property system of the canton of Bern was made on the basis of federal law, viz., general notions and the nature of things, by the BG. (June 30, 1905) 31 BGE. I 287, 294; *cf.* SCHOCH, "Conflict of Laws in a Federal State: the Experience of Switzerland," 55 Harv. L. Rev. (1942) 738, 767ff.

¹⁹³ Classified as part of the matrimonial law by Cour Paris (Jan. 6, 1862) S.1862.2.337, discussed by BARTIN, *Études* 70; NEUNER, *Der Sinn* 60.

¹⁹⁴ *Cf.* NEUNER, *Der Sinn* 64-66.

¹⁹⁵ Classified as part of succession law by French Cass. (civ.) (Aug. 16, 1869) S.1869.1.417.

On the question whether or to what extent provisions of a marriage settlement are offset by the provisions of distributing statutes establishing forced shares, see BRESLAUER, "Conflict of Laws in Restrictions on Freedom of Testation," 27 Iowa L. Rev. (1942) 425, 441; NEUNER, 5 La. L. Rev. (1943) 187, *supra* n. 1.

¹⁹⁶ This method has in fact been observed by the Reichsgericht since early times; see its decision RG. (Dec. 19, 1887) 43 Seuff. Arch. 288 and (Nov. 25, 1895) 36 RGZ. 331, 334. The French courts have also followed it, as NEUNER, *Der Sinn* 60 has demonstrated in opposition to BARTIN's thesis of classification according to the *lex fori*.

Thus, for instance, under the Massachusetts statute, a widow has a dower interest in the property of her late husband, while no community property is recognized. A husband, who shortly before his death had transferred his domicil to California, would not leave any community property, nor would the widow have any dower right. "That result would defeat the spirit of both of the dower laws of Massachusetts and of the community property laws of the distributory estate; yet it would be reached none the less."¹⁹⁷ If the husband had gone to Louisiana, the widow would receive nothing if there are "heirs."¹⁹⁸ Conversely, where the husband removes his domicil from California to Massachusetts, the widow enjoys simultaneously her community share acquired under California law and the dower interest under Massachusetts law.

Similarly, in Sweden the wife is granted a share in the community fund and for this reason is excluded from participation in the inheritance, if there are descendants of the husband. Where a German married couple, not having concluded a marriage settlement, acquire Swedish nationality and the husband dies, the widow has no claim under German matrimonial law, which provides no benefits for the wife, nor under Swedish inheritance law.

Where, conversely, a wife is not given any matrimonial right (except, of course, through an express marriage settlement), she may be granted under modern legislation a generous and indefeasible portion in her deceased husband's estate. If, for instance, the spouses were of Swedish nationality at the time of their marriage and later became German nationals, in the courts of both countries the widow would receive, under the Swedish matrimonial law, half the husband's property as community part and, in addition, under the German law of succession on death, half or a quarter of the rest as heir.

¹⁹⁷ LEFLAR, 21 Cal. L. Rev. (1933) 221 at 226, 227, *supra* n. 1.

¹⁹⁸ La. C. C. (Dart, 1932) art. 924; NEUNER, 5 La. L. Rev. (1943) at 176, *supra* n. 1.

Thus, coordinations carefully worked out within a domestic statute are badly disturbed when different systems of law are called into play by the choice of law rules on matrimonial property and inheritance. Ingenious remedies have been suggested,¹⁹⁹ but so far with little success. The problem is aggravated by the double fact that in most systems of private law the relation between the two groups of provisions is hidden, and that the factual situations are far from suggesting that radical change of the conflicts rules, or enlargement of the scope of the law at the last domicile, is in equity required. We may take for illustration the American cases in which the husband transfers his domicile from a separate property state to a state where community property obtains. Apart from the hardship imposed by the former common law doctrine upon the wife, which it was not the task of conflicts rules to remedy, it seems not inequitable to apply the law of the first domicile. Bruggemeyer,²⁰⁰ a lawyer, earned almost all his money in Illinois as his separate property and then stayed for years with his wife in California where she died. There was no reason why this change of domicile should have shifted half of his earnings to the heirs of his wife. The spouses Latterner²⁰¹ lived three years in Boston, Massachusetts, and fifteen in Los Angeles, until they separated. No equitable argument challenged the character as separate property of the husband's earnings as a physician in Boston. O'Connor²⁰² married in 1925 in Indiana, but the spouses separated within "a few days"; there was no ground why the husband's later moving to California should give the widow half of the husband's premarital land in Indiana.

The easiest practical way to assure that matrimonial and inheritance statutes in the same legal system preserve their

¹⁹⁹ See RABEL, 5 Zausl.P.R. (1931) 283; NEUNER, Der Sinn 66 and 5 La. L. Rev. (1943) 190, *supra* n. 1; 4 FRANKENSTEIN 326; RAAPE, 2 D. IPR. 197.

²⁰⁰ *In re Bruggemeyer's Estate* (1931) 115 Cal. App. 525, 2 P. (2d) 534.

²⁰¹ *Latterner v. Latterner* (1932) 121 Cal. App. 298, 8 P. (2d) 870.

²⁰² *In re O'Connor's Estate* (1933) 218 Cal. 518, 23 P. (2d) 1031.

natural balance, is simply more circumspect drafting of these statutes. In this country, a federal Union where a part of the population is inclined to change domicil, statutes of descent and distribution should not blindly envisage only cases where both the first and the last domicil happen to be in the state and, moreover, no marriage settlement was established. In a community property state, the possibility that the surviving spouse may fail, for any cause without his fault, to enjoy the regular matrimonial share, should be considered. Vice versa, in a separate property state, there should be an appropriate provision to adjust the ordinary distribution in the case where the surviving spouse is amply provided with a matrimonial property interest. True, theoretically the matter belongs to conflicts law, but conflicts rules suitable to all situations are scarcely available at this time.

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PART FOUR

DIVORCE AND ANNULMENT

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CHAPTER 11

Divorce

I. THE PROBLEM OF FOREIGN DIVORCE

THE conflicts rules concerning divorce are generally applicable not only to absolute divorce, i.e., dissolution of the bonds of marriage, but also to limited divorce, such as separation from bed and board and similar types of judicial separation, not merely temporary. Nevertheless, we shall confine our discussion in general to absolute divorce. Judicial separation has some particular features; for example, there are special rules in the United States respecting the recognition of foreign separation decrees.¹

1. Aspects of the Problem

Divorce is to be studied here in three aspects. We have to consider first the connection that the parties to a divorce suit (or corresponding proceedings of a non-contentious nature) are required to have with the forum and, in the case where persons, not subjects of the forum, are permitted to be parties, the law applicable to the suit. In the second place, it will be presupposed that a divorce decreed in one jurisdiction is being examined for the purpose of recognition in another. Third, the extraterritorial effects of non-recognized and of recognized divorce decrees will be analyzed more precisely.

The subject to be discussed in this chapter has been somewhat neglected in comparative surveys and international discussions. Particularly in this country, endeavor to improve the actual situation in case a marriage may be regarded as existent in one state and dissolved in another, with all its tremendous

¹ Restatement § 114 and comment.

consequences for the parties and their issue and third persons, has chiefly centered around the recognition of foreign decrees. In the highly spirited debate under the headline of *Haddock v. Haddock*,² or now of *Williams and Hendrix v. North Carolina*,³ it has been asked what position should be taken by a state whose court is requested to recognize another state's divorce decree, rather than what attitude might be suitable to that state whose court is to take cognizance of the original application for divorce.

Every state of the Union has the unquestionable power to determine by itself all of its divorce policy; on the other hand, by the impact of the Full Faith and Credit Clause as developed by the Supreme Court of the United States, recognition of divorce decrees is compulsory under certain conditions. Hence, not unnaturally, scrutiny of the more or less anomalous decrees rendered by the courts of about fifty jurisdictions and selection of those decrees that deserve recognition, has appeared the chief problem. The complement of the problem is, what limits every state ought to observe in opening its courts to divorce, so as to facilitate reciprocal recognition. Perfect mutuality has been reached by this method in such treaties as those of Montevideo and the Scandinavian states. The drafters of the successive uniform acts in this country⁴ also distinctly perceived the problem and found, in the writer's opinion, an adequate solution; yet these acts have encountered an amazingly unfriendly reception.⁵ The restaters of the law of conflicts, too, saw the

² (1906) 201 U. S. 562.

³ (1942) 317 U. S. 287.

⁴ Draft of a Uniform Divorce Law, 14 Harv. L. Rev. (1901) 525; Resolutions, adopted by the National Congress on Uniform Divorce Laws in Washington, D. C., Feb. 19-22, 1906; Proposed Uniform Statute relating to Annulment of Marriage and Divorce submitted by the Subcommittee on Resolutions to the Divorce Congress of Philadelphia, Nov. 13, 1906. This statute was approved by the National Conference of Commissioners on Uniform State Laws in 1907 and adopted in Delaware, New Jersey, and Wisconsin, but was replaced by the Uniform Divorce Jurisdiction Act of 1930, 9 Uniform Laws Annotated (1932) 133.

⁵ See especially VREELAND 50. His own propositions were called politically impossible by STUMBERG, Book Review, 2 La. L. Rev. (1939) 207.

goal when they started to define "jurisdiction for divorce,"⁶ apparently as an absolute notion, good for the use of all courts concerned. But what they have stated can hardly be meant to bind the courts granting divorce; it has useful reference only to the problem of deciding in which cases the jurisdiction exercised by a divorce court should be recognized by a court of another state, i.e., the problem of jurisdiction in the international sense.

2. Diversity of Divorce Legislation

Comparative research in divorce legislation has revealed staggering diversity. However, for writers to claim for this reason alone that in cases of conflict of laws every state must stick to its own policy without regarding the outside world, is an overstatement. Certain contrasts are fundamental indeed; others are not.

The doctrine of the Catholic Church that marriage cannot be dissolved except by death, although having lost its force in many countries, actually prevails in Argentina, Bolivia, Brazil, Chile, Colombia, Ireland, Italy, Paraguay, and Spain, and with respect to Catholics in some parts of Eastern Europe and the Middle East.⁷ Absolute divorce is excluded also in South Carolina.⁸ Next to this group, we must place the laws of New York and formerly of the District of Columbia, admitting divorce only on the ground of adultery.⁹

Looking to the opposite end of the line, we notice several institutions of a very diverse nature. There are remainders of the old patriarchal repudiation by which, for instance, an Egyptian Moslem may divorce his wife without any alleged cause. There is the ultramodern view of the Russian Soviet Republics allowing each spouse to terminate the marriage by

⁶ Restatement §§ 110-113; cf. *ibid.* at §§ 43, 77.

⁷ See *infra* p. 430.

⁸ S. C. Constitution, Art. 17 § 3.

⁹ D. C. Code (1929) tit. 14 § 64, was repealed by the Act of August 7, 1935, 49 Stat. 539, c. 453, § 1.

Laws of New York (Cahill, 1937) C.P.A. § 1147.

unilateral declaration. Neither state nor church influences this act. Again, we may add a few American and Mexican jurisdictions where the dissolution of marriages is offered, as the current expression goes,¹⁰ on a commercial basis; also, in addition to these open divorce markets, some states are disgraced by abusive practices. The Old Testament right of a sovereign head of a household, the Soviet emphasis on freedom of marriage, and the readiness of American courts to provide divorce, are certainly heterogeneous phenomena, but in common they result in permitting indiscriminately what the legislations of the first group refuse indiscriminately.

We may well call both groups of legislations radical and set them apart for the major purposes of conflicts law. In the rest of the world, divorce regulations form a block of kindred systems. To be sure, they are very far from being homogeneous. The old conception that divorce is a remedy given to an innocent against a guilty party vanishes more or less slowly; modern social aims are gaining acknowledgment here and there; private interest and public welfare are differently evaluated; many historical remainders and arbitrary predilections of local lawmakers increase the number of varieties. Vernier lists eight major and thirty-one minor causes for divorce in this country alone, irregularly distributed over fifty jurisdictions.¹¹ Defences, principles of procedure, authorities empowered with granting divorce, are diverse. Nevertheless, the basis is a common one: marriage can be dissolved, if dissolution appears to be the minor evil, and whether it is must be controlled by an agency of the state in appropriate proceedings. A really basic difference occurs respecting the question whether a mutual agreement of the parties should be accepted

¹⁰ Hatton, J., of Tonopah, sitting during the vacation of a judge in Carson City, Nevada, "asserted that the State Legislature, with commercial intent and under pressure, had legislated the present divorce law," in the cause of *Mrs. de Forest Payne*, N. Y. Times, Sept. 29, 1942, p. 12.

¹¹ 2 VERNIER § 62.

as a self-sufficient ground for divorce decrees, but, strangely enough, this point has not been much emphasized as a consideration of public policy in conflicts law. On the whole, soberly examined, a modern statute on divorce is usually on the middle road, a product of compromise with an increasing admittance of social-hygienic ideas. There is little need for conjuring up the vision of bridgeless gulfs between conceptual antitheses.

There is something more to tone down the contrasts. A statute such as that of Nevada or of a Mexican state embodies the normal terms and provisions, at the most indulging in some clauses that promise secrecy or allow unnamed grounds for divorce at the discretion of the judge, while the experiences of other countries, we may discover, again and again reveal an average practice laxer than the official language indicates. Lawyers know this well, each with respect to his own state; probably it is a universal tendency. A few illustrations: When before the Matrimonial Causes Act, 1937, adultery was the only divorce ground in England, scandalous maneuvers were in semi-official use to simulate evidence of adultery. The same revolting practice is said to be frequent in New York. Courts where desertion is not recognized as a cause, find a cause in cruelty and vice versa; in the numerous countries following the *Code Napoléon*, "*injures graves*" is an elastic notion. German courts were never seriously embarrassed by the provision that the defendant spouse must have caused the breaking up of the marriage by his reprehensible conduct. A reform of the law was demanded and finally accomplished, with the effect of legalizing the liberal practice and obviating the conventional lies of the parties, rather than of introducing a new rule.

Why are these practices admitted? In large centers of population, courts are unable to examine the individual circumstances as they might wish to do. As has well been observed in

this country,¹² collusion between the parties or abandonment of the cause by the weaker party characterize the overwhelming majority of cases. A divorce judge in any such country has the feeling of gliding down an inclined plane; no stop anywhere is firmly assured, once divorce has been permitted. Of course, there will always be judges more conscientious, or conservative, or formalistic than the average. But it is the general trend that counts. And even the general prohibition of divorce does not work without exceptions. Courts without absolute divorce at their disposal are inclined to grant annulment of marriage where in other systems divorce would be expected.

In addition, there are geographical limitations on legislative control. Italian couples went to Fiume for divorce, Argentines continue to go to Montevideo, citizens of South Carolina to Georgia and North Carolina, and the answer to New York is given in Reno. That only wealthy people are able to escape their home laws aggravates the moral aspects of the situation.

Paradoxes reach a climax in the field of recognition. Foreign decrees are irregularly recognized in this country and encounter prohibitive defences in Continental Europe, especially in the country to which a party belongs as a national. However, if "invalid" divorces are not a simple "myth" within the United States,¹³ the contention that they are to a large extent in fact recognized is true with respect to all countries.

3. Divergence in Method

In approaching the problem of the interstate and international treatment of divorce, we must be aware of a funda-

¹² HARPER, "The Myth of the Void Divorce," 2 *Law and Cont. Probl.* (1935) 335; JACOBS, "Attack on Decrees of Divorce," 34 *Mich. L. Rev.* (1936) 749, 959; SAYRE, "Divorce by Judicial Process," 18 *Iowa L. Rev.* (1933) 493, 508; Note, 36 *Col. L. Rev.* (1936) 1121; cf. JACOBS, "The Enforcement of Foreign Decrees for Alimony," 6 *Law and Cont. Probl.* (1939) 250, 251.

¹³ GOODRICH § 128 n. 46.

mental difference between the American method and that followed in the principal civil law countries.

In this country, it is a matter of course that every state grants jurisdiction for divorce without asking what extra-territorial effect the forthcoming decree will enjoy in other states. Moreover, so soon as jurisdiction is assumed by a court, there is no doubt that the case will be decided in exclusive accordance with the municipal statute of the forum (*lex fori*), irrespective of any qualifications of the parties; no choice of law therefore is involved.

The most representative legislations of the civil law, however, take into consideration the position of the law of the state whose nationals the parties are, with regard to one or both of the following points:

- (i) Jurisdiction in the case of foreign nationals is not assumed unless the national law of the parties is willing to recognize this jurisdiction.
- (ii) Divorce is not granted, unless it is agreeable to the internal law of the national state of the parties.

In the heyday of the principle underlying these ideas (the so-called principle of nationality), many writers went further, applying the pure national law of the parties.¹⁴ But with the Introductory Law to the German Civil Code (1896) and the Hague Convention on Divorce and Separation (1902) as models, it is now generally required that both the foreign and the domestic laws must concur in permitting divorce in the particular case. Hence, the law of the forum, although not exclusively governing, as in the common law countries and others, has more to say than in almost any other field of conflicts law. Its importance is further increased where one party is a subject of the forum and the other a foreign national.

¹⁴ GIERKE, I *Deutsches Privatrecht* 236, REGELSBERGER, I *Pandekten* 178; 5 LAURENT 244, 276, 285, and others.

4. Predominance of *Lex Fori*

Why in divorce involving foreign aspects, the law that a court must apply in purely domestic matters should have such an abnormal influence is usually explained by a general reference to the nature of the institution. It is said that divorce is permitted or refused in every state according to its tradition, religion, ethics, logic (or what is believed to be logic), and in conformity with hygienic and other considerations of population policy. This general reasoning is not adequate to the subject. Consideration of the three groups of divorce legislations set out under (ii) above, taken as a basis to measure affinity of divorce policies, suggests the following.

The standards of each of the three groups are basic. We may be astonished indeed by the grouping of states in which the Hague Convention of 1902 undertook to unify the rules for granting divorce and for recognizing foreign divorce. There were, on the one hand, the states which had normal modern legislations and, on the other hand, Austria, Italy, Portugal, and the Czarist Russian Empire, where at that time divorce was either left to the ecclesiastical authorities of the various denominations, or forbidden at least to Catholics. Italy has remained a member and retained its ban on divorce; the Convention has prevented Italian nationals from being divorced in any participating state. This has been praised as a great progress in international cooperation,¹⁵ but it has resulted in the final withdrawal from the Convention of France, Belgium, Switzerland, Germany, and Sweden successively. It is quite as prejudicial to combine legislations of contradictory character for the purpose of reciprocal respect, as it is to exaggerate minor varieties of policy. In federations that guarantee mutual recognition of state acts between the single states, it should be presupposed that the aims of the several legislations, varied

¹⁵ LEWALD, "Haager Konventionen zum Internationalen Privatrecht," in STRUPP, 1 Wörterbuch des Völkerrechts und der Diplomatie 466.

as they may be, are not fundamentally hostile to each other. In a Union including legislations of New York and Nevada, the Full Faith and Credit Clause cannot work smoothly. It is the writer's conviction that it is not so much the multitude of regulations in the United States as the extremes to which a few of them go that creates difficulties in the mutual recognition of divorce decrees.

On the side of the majority group, no such prominent differences obstruct mutual understanding. All these systems strive, through an institution controlled by the state, to assure sound domestic relations within the limits to which the assistance that law and legal machinery provide is subject. To apply the law of the forum among states of this group to foreigners as well as to citizens presumes a claim to a stringent public policy that cannot be objectively justified by the accustomed standards of comparative law. Whether considerations pertaining to the field of conflicts rules better support that claim, will be asked later.

5. "Migratory" Divorce

Our subject includes divorces described in the United States as "migratory" and probably best defined as divorces obtained in a state by persons who have just completed the minimum time of residence required by the local statute for granting jurisdiction over divorce. Technically, it is required that a bona fide domicil be established and, in the prevailing opinion, that the person must have had actual residence during this time. Hence, it is presumed by the law "of the books" that the newcomer has intended to transfer the center of his entire life to the state for an indefinite time. In contrast, it is not sufficient to take residence within the jurisdiction merely for the purpose of obtaining divorce, although the circumstance that the domicil is changed with the motive of securing a divorce is not prejudicial. The minimum requirement of "resi-

dence" is generally understood to evince the required mental purpose, which, to put it simply, is that of establishing a real and permanent domicile.

The actual picture looks so different from this legal structure that migratory divorces are currently identified with those obtained in evasion of the domiciliary statute, i.e., by a falsely pretended domicile. The rate of migratory divorces in the first sense, i.e., upon completion of minimum residence requirements, has been appraised for the year 1929 as constituting only 3 per cent of the total number of divorces in this country, a much smaller percentage rate than had been feared.¹⁶ The absolute numbers, however, are high.¹⁷ The total of divorces was over 200,000 in 1929 and, after the drop caused by the depression, reached 250,000 in 1937 and about 264,000 in 1940. In the two counties in Nevada, Clark and Washoe, where Las Vegas and Reno are situated, divorces totaled 1756 in 1929, 4769 in 1931, and 3629 in 1935.¹⁸ The rate of divorce for 100,000 population has been estimated with respect to the year 1940 as 200 in the United States, 90 in the Middle Atlantic states, and 4710 in Nevada. More serviceable than many arguments used to moderate the apprehensions that must be aroused by the rapid increase in these rates is comparison. Although in Europe, excluding Soviet Russia, no country reaches even half of the American percentage, the highest percentage of divorces occurs in Switzerland,¹⁹ despite

¹⁶ CAHEN, *Statistical Analysis of American Divorce* (1932) 78. The apparently optimistic views of this writer have influenced most sociological observers.

¹⁷ U. S. Bureau of the Census, *Vital Statistics, Special Reports*, U. S. Dept. of Commerce, Vol. 15, No. 18, p. 193 (March 20, 1942). Estimated number of divorces by states, United States 1937-1940.

¹⁸ According to a newspaper correspondence in 1943, there were 5910 divorces in Washoe County and 2720 cases in Clark County, an "all time high" rendering \$200,000 in fees in these counties. The total of seventeen county courts in Nevada is given with 11,399 divorces against 8,616 in 1942, the fees amounting to more than \$500,000.

¹⁹ This fact has been observed by Swiss authors. GMÜR, 2 *Familienrecht* 150, with respect to the decade of 1900 to 1909. It is confirmed by the following

the repugnance to divorce in the Catholic inner cantons and the conservative character of the population in the entire country. In 1931 the rate of divorce for 100,000 population was 70 in Switzerland as against 147 in the United States. We may conjecture that the spirit of advanced democracy and industrial enterprise has some influence on the frequency of divorce. Yet, obviously, every divorce marks a regrettable failure even for a childless couple, and lawyers cannot fail to be moved by the inadequacy of their machinery. The divorce mills complete the evils of familial maladjustments; not only do they work against the intentions of sister state legislatures, in itself a sign of unsound relations, but they also enable legislatures, courts and attorneys to destroy homes for the sake of local profits.

6. Ex Parte Proceedings

The many cases in which, under modern statutes, a spouse can sue for divorce while the other party is resident in another state, need particular care by legislatures and courts. Not only do almost all legislations of the world allow in such cases subsidiary use of service by publication and the grant of divorce despite the absence of the defendant, but often the procedural guarantees are handled unsatisfactorily.²⁰ Facts alleged by the plaintiff are not sufficiently verified. Even fraudulent maneuvers—for instance false indication of the defendant's address designed to prevent due notice of the trial—are not efficiently

figures regarding the year 1927: divorce rate per 100,000 population: England and Wales, 7.3; Belgium, 31; France, 45; Germany, 57.6; Denmark, 55; Switzerland, 62; Japan, 79; United States, 160; Leningrad, 983; Moscow, 959. REUTER and RUNNER, *The Family* (1931) 210; HANKINS, "Divorce," 5 *Encyclopaedia of the Social Sciences* (1935) 177. Higher figures in similar proportion have been indicated for 1935, omitting Switzerland, see JACOBS, *Cases on Domestic Relations* (ed. 2, 1939) 352. The relation to "married persons" or "existing marriages" would be more instructive, but this is not available.

²⁰ Very conveniently, SAYRE, "Recognition by Other States of Decrees for Judicial Separation and Decrees for Alimony," 28 *Iowa L. Rev.* (1943) 321, 339 suggests "more effective substituted service than is required now" as part of the process.

counteracted, whatever the law of procedure may be.²¹ No wonder that the international attitude is simple mistrust. Easily gained divorces may be attacked in the courts of other states, if enforcement is sought or, alternatively, annulment is asked. And this, despite the fact that everywhere, by customary law or statute or express clause of international treaty, proper service and a decent opportunity for defence are made primary conditions to the recognition of foreign divorces. Any observer will note that all those states whose courts indulge in routine service by publication, are among the severe censurers of the same act by foreign courts.

We have, however, to limit our survey to the two main questions of jurisdiction and choice of law.

II. JURISDICTION

A divorce suit is considered to belong to a court either by virtue of some domiciliary connection or the nationality of both, or possibly one, of the parties.

Other grounds for assuming divorce jurisdiction have sometimes been deemed to include the place where the marriage has been celebrated or the place where an offence against the marriage has been committed. The first conception is derived from regarding marriage as a contract and dissolution of marriage as a rescission thereof; the second reflects the idea that divorce is of a penal nature and therefore governed by the law of the place of the wrong. These conceptions no longer retain roots in the present legislations; their after-effects may be discerned in certain rules of choice of law and, in this country, in some additional provisions relative to jurisdiction over divorce, rather than in the main principles.

²¹ Among the endeavors to help the victims of divorce, the activities of the International Migration Service are particularly deserving. See WAINHOUSE, "Protecting the Absent Spouse in International Divorce," 2 *Law and Cont. Probl.* (1935) 360.

The existence of a third ground for jurisdiction is quite uncertain. Generally, it is emphatically denied that in matrimonial causes the parties may agree on a court.²² Nevertheless, sometimes openly, courts are induced to take jurisdiction without close scrutiny, when the defendant consents to the suit.²³ In any event, jurisdiction is quite frequently assumed everywhere on undisputed false allegations of domicile, without any inquiry by the court, which is equivalent to making the parties *domini litis* as to jurisdiction, and—more legitimately—a separate domicile of the wife is recognized when the husband consents.

1. Nationality as Basis

The faculty offered by most civil law countries to their nationals to bring suit for divorce even when the plaintiff is domiciled in another country may be briefly mentioned.²⁴

A few countries go so far as to reserve all matrimonial suits involving a national to their own courts exclusively, even if the parties are domiciled abroad and in the most distant

²² There are exceptions such as the permission by Mexican state laws to grant jurisdiction in divorce when both parties submit to the court. The Federal Supreme Court holds recognition due in the Federal District and Territories in the case of express submission as contrasted with tacit agreement, on the basis of art. 602 of the Cod. Fed. de Proc. Civ. See decisions (April 2, 1935) 44 Seman. Jud. 72 as to the state Chihuahua, and (Dec. 7, 1934) 42 Seman. Jud. 3596 as to the state Morelos.

²³ Submission to divorce jurisdiction is treated as actually effective in Greece by 2 STREIT-VALLINDAS 379.

It has been considered but rejected in Argentina, see LAZCANO, 57 J.A.(1937) 463ff. n. 128.

The Brazilian Supreme Court, however, seems to have construed arts. 318-323 of the Código Bustamante, allowing submission to a court, so as to include jurisdiction in divorce; Fed. Sup. Ct. (July 17, 1940) 58 Arch. Jud. 83.

In the English case of Hussein v. Hussein (1938) 54 T.L.R. 632, marriage was celebrated in England but the husband was not even a resident. The court took jurisdiction on the undefended suit by the wife, a decision presented as model to Scotch courts in 50 Jurid. Rev. 195.

²⁴ For details see French Cass. (req.) (April 29, 1931) S.1931.1.247.

German Code of Civ. Proc. § 606 par. 2.

Switzerland: NAG. art. 7g.

regions. Once the Czarist Russian and the Austrian Empires were in this group. Today the list includes—after many doubts are discounted²⁵ and leaving Austria aside²⁶—Czechoslovakia,²⁷ Hungary,²⁸ the former Austrian and Hungarian parts of Rumania,²⁹ Poland,³⁰ and Turkey.³¹ On the other hand, such

²⁵ In Greece exclusive jurisdiction is no longer claimed by the courts except for Greeks domiciled in Greece. See STREIT, 20 Recueil 1927 V 151; FRAGISTAS, 7 Z.ausl.PR. (1933) 297; 2 STREIT-VALLINDAS 382; cf. Trib. Athens 1933, no. 1676, Clunet 1934, 1041; Trib. Athens (1st inst.) 1935 no. 8250, 47 Themis 582, Clunet 1937, 597, TENEKIDES, Clunet 1937, 598.

Portugal: 1 BERGMANN 551.

²⁶ Austria: § 81 no. 3 of the "Jurisdiction Law" (Exekutionsordnung) was understood as reserving divorce jurisdiction over nationals to the Austrian courts, see WALKER 724. It was (or is?) controversial whether this rule survived the annexation of Austria in 1938; two Swiss decisions applied it to Austrian émigrés: Kantongericht St. Gallen (Jan. 20, 1939) 37 SJZ. 73 no. 15, and App. Bern (March 12, 1940) 37 SJZ. 32 no. 6; also BECK, "Zur Frage der Scheidung von Oesterreichern in der Schweiz," 38 SJZ. (1941-1942) 57.

²⁷ § 81 no. 3 of the Austrian Jurisdiction Law was maintained in Czechoslovakia. Nevertheless, the exclusiveness of jurisdiction was in controversy between the Supreme Court and the government and was finally settled tentatively. See for details German RG. (Oct. 26, 1933) 143 RGZ. 130; R.MAYR, 1 Z.osteurop.R. (1934) 177. In the later period, most German courts refused to exercise jurisdiction over nationals of Czechoslovakia; see KG. (Oct. 17, 1930) IPRspr. 1931, no. 62, and the decisions *ibid.* nos. 134-141; RG. (Feb. 18, 1937) 154 RGZ. 92. *Contra*: OLG. Jena (May 11, 1934) JW. 1934, 2795; IPRspr. 1934, no. 124. Similar result in Switzerland: App. Zürich (April 21, 1937) 34 SJZ. (1937-1938) 282 no. 51, Bl.f. Zürich. Rspr. 1937, 353, 12 Z.ausl.PR. (1938) 587.

²⁸ Hungarian Marriage Law of 1894, § 114; cf. 11 Z.ausl.PR. (1937) 187.

²⁹ See 1 BERGMANN 590.

³⁰ A contrary liberal doctrine was clearly adopted by the Polish Law of 1926 on private international law, art. 17 par. 3, on which a great many German decisions were based, see RAAPE 397. It was the declared intention of the judicial commission of the Polish Sejm, as the Polish Ministry of Justice recognized, to facilitate the divorce of Polish emigrants before foreign courts. See documentation of the decision of App. Danzig (Oct. 21, 1937) 4 Z.osteurop.R. (1937) 304. Yet, the tendencies were reversed, and by a rather surprising interpretation of the Polish Code of Civil Procedure of 1932, § 528, recognition of any foreign divorce decree was refused except for the reciprocity provided by treaty. See ZOLL, 8 Z.ausl.PR. (1934) 716; Polish Supreme Court (Feb. 5, 1931) Z.f.Ostrecht 1932, 383; Polish Supreme Court (April 23, 1936) Clunet 1937, 617; and Polish Supreme Court in Plenary Civil Chambers (May 29, 1937) published in Dt. Justiz 1938, 251; cf. RABEL, 8 Z.ausl.PR. (1934) 718; 9 *ibid.* (1935) 290. MASSFELLER, "Einzelfragen aus dem deutschen internationalen Ehescheidungsrecht," JW. 1935, 2465. Correspondingly, jurisdiction was denied by RG. (Feb. 24, 1936) 150 RGZ. 293; RG. (July 3, 1939) 160 RGZ. 396, 399; OLG. Stettin (Sept. 23, 1938) JW. 1939, 249.

³¹ Turkey: Art. 13 no. 6 of the Law of April 22, 1924, amending § 18 of the Code of Civ. Proc., see 1 BERGMANN 768.

exclusive jurisdiction is not claimed by the vast majority of states, and, although at one time nationality of the husband was considered the only generally sufficient condition for divorce jurisdiction,³² in some countries nationality alone, without domicile or at least residence, of one party in the state is considered insufficient for suing or being sued.³³ Even so, many conditions attach to recognition of foreign divorce decrees by the national states, including such powers of re-examination as approximate exclusive jurisdiction.³⁴

The conflicts between the claims of the national and the domiciliary jurisdictions have attracted a great deal of attention. Generally, the only remedy envisaged has been in concessions by the states of domicile to those states to which the parties involved belong. Not only has the Hague Convention sanctioned this trend, but, more moderately, even an English authority has suggested that divorces rendered at the competent court of the national state should be recognized in England the same as decrees of the matrimonial domicile.³⁵

2. Domicil as Basis

By common law, coverture effects a merger of the personalities of husband and wife. The wife necessarily shares the domicile of the husband. This "matrimonial domicile" is, if any, the most suitable place for the dissolution of the marriage or, in the terminology of the common law, to locate the "*res*" that constitutes the object of the action *in rem*, as the action for divorce is commonly regarded. It happens that under common law the private relations of individuals are generally governed by the law of their domicile, and this, of course, is

³² See Gebhardsche Materialien 184.

³³ E.G., Czechoslovakia: see S. Ct. nos. 1449, 1534, 2746; The German Law on Divorce of January 24, 1935, § 1; Swiss NAG. art. 78 par. 1 also involves restrictions; see BG. (Oct. 10, 1930) 56 BGE. II 335, at 341.

³⁴ See *infra* pp. 474, 478-480.

³⁵ GUTTERIDGE, "Les conflits de compétence juridictionnelle en matière de divorce et de séparation de corps," *Revue Dr. Int. (Bruxelles)* (1938) 1, 7, 16, 28.

interrelated with the domiciliary principle of jurisdiction. But the idea that the domicile of the parties, even of one party, in a state suffices to give that state jurisdiction for divorce, because divorce is a matter of "status"—this "generally accepted doctrine," in the words of Beale³⁶—may be questioned after a glance at the rules of the civil law countries. In most of these, status and capacity of an individual are governed not by the law of his domicile but by that of the country whose national he is (principle of nationality). Nevertheless, also in these countries, jurisdiction for granting divorce is ordinarily assumed at the matrimonial domicile or at the domicile of one party. Certainly, divorce alters the family status of a person, and, therefore, the states following the nationality principle have partly opened their courts to non-domiciled nationals also. But the reasons why jurisdiction is given at the "domicil" and the more precise determination of domicile for this purpose are not to be found in any doctrine. They are policy considerations that we shall subsequently try to analyze.

(a) *Common domicil*. Where, under the conception of the court applied to for a divorce, both spouses are domiciled, in the full sense of this word, within the forum, jurisdiction is granted in all states acknowledging the dissolution of marriage *inter vivos*. There are two groups.

The matrimonial domicile is sufficient everywhere for assuming jurisdiction. However, in Great Britain since the subject was clarified in 1895,³⁷ in the British dominions,³⁸ and under the present Treaty of Montevideo,³⁹ the matrimonial domicile has remained the *sole* test of jurisdiction for the pur-

³⁶ 1 BEALE § 110.1.

³⁷ *Le Mesurier v. Le Mesurier* [1895] A. C. 517.

³⁸ An exception for a wife living separately is made in the New Zealand Divorce and Matrimonial Causes Amendment Act, New Zealand Statutes, 21 Geo. V, Session III (1930) No. 43, p. 248 sec. 3, in consequence of the English cases in *misericordia*, see below, n. 128. For particulars, see READ, Recognition and Enforcement 200, 201, 223.

³⁹ Treaty of Montevideo, text of 1889, art. 62; text of 1940, art. 59.

pose of divorce. The wife has her domicile with that of the husband by operation of law. It is the most certainly recognized case of divorce jurisdiction also in this country.⁴⁰

This simple system of conferring jurisdiction also provides an appropriate test to determine the applicable law, since the statutes of the state where the marriage is located work in the double function of *lex fori* and *lex domicilii*, and moreover, among the states adopting this system, mutual recognition of divorce decrees is easy.

In countries acknowledging a separate domicile of the wife or ignoring the institution of legal domicile, the principle has to be modified. Jurisdiction is exercised when both spouses have their domicile within the state, either together or separately.⁴¹ Naturally, this rule obtains in the United States.⁴²

The reasons supporting these rules and underlying the "res" theory are obvious. A community in which the spouses have centered their lives may feel competent to adjudicate the continuation of their marriage. Insofar as the conduct of private persons may deserve consideration in determining jurisdiction, an element of submission to the state activity may be implied. On the other hand, it appears a superfluous hardship to send the parties away to their distant homelands; this would sometimes mean their ruin.

(b) *Presumption of common domicile*. If in the eyes of the forum the parties have their domicils in different states, an attempt has been made to maintain the original system in one of two ways.

One way is this: The last matrimonial domicile of the parties is held competent for the purpose of divorce, even though it

⁴⁰ Haddock v. Haddock (1906) 201 U. S. 562, Atherton v. Atherton (1900) 181 U. S. 155; Restatement §§ 110, 114.

⁴¹ Hague Convention on Divorce of 1902, art. 5 no. 2 § 1: "... before the competent authority of the place where the parties have their domicile."

Under the Scandinavian Convention, art. 7 par. 1, this is the main ground for jurisdiction.

⁴² Restatement § 110.

has been deserted by the husband. Thus, the ancient construction is superseded, whereby the husband would transfer the matrimonial domicil to his new place. This progress was made in the United States as the earliest step to improve the situation of married women as against offending husbands.⁴³ The same step has been made in British countries⁴⁴ and, as late as 1937, in England.⁴⁵ The draftsmen of the recent revision (1940) of the Montevideo Treaty added a similar clause to their text,⁴⁶ after the Argentine practices had taken a kindred view.⁴⁷ Analogous clauses in the Hague Convention and the Swedish law permit divorce at the former common domicil in case the defendant has deserted his spouse or has left the country after a cause for divorce arose,⁴⁸ and, more generally, the Scandinavian Convention gives jurisdiction to the state where both spouses "had their last common domicil and one of them is still domiciled."⁴⁹ Traces of this stage of the development are frequent in this country.⁵⁰

The other way has been demonstrated by the German procedural code. Where both parties are of foreign nationality, the actual domicil of the husband within the state is sufficient

⁴³ See 1 BEALE § 28.2.

⁴⁴ Canada: Divorce Jurisdiction Act (1930) 20-21 Geo. V, c. 15 § 2. Australia and New Zealand: see the detailed statements by READ, Recognition and Enforcement 224.

⁴⁵ Matrimonial Causes Act, 1937, 1 Edw. VIII & 1 Geo. VI, c. 57, § 13.

⁴⁶ Treaty of Montevideo, text of 1940, art. 59 par. 2.

⁴⁷ Cám. civ. 2 Buenos Aires (March 24, 1933) 41 J. A. 420; the law of the matrimonial domicil determines also the question whether the husband has deserted his wife, Cám. civ. 2 (Oct. 7, 1935) 52 J. A. 144.

⁴⁸ Hague Convention on Divorce of 1902, art. 5 no. 2 par. 1 sentence 3; Sweden: Int. Fam. Law of 1904 with subsequent amendments, c. 3 § 1 par. 1 sentence 2.

⁴⁹ Scandinavian Convention art. 7 par. 1.

⁵⁰ In particular, venue exists in the county where the parties lived as husband and wife, if the defendant still lives there, *cf.* Mass. Gen. Laws (1932) c. 208 § 6, or if the plaintiff lives there, *cf.* Miss. Code Ann. (1930) § 1417, or without such conditions, *cf.* Ala. Code Ann. (1940) tit. 34 § 28; Va. Code Ann. (Michie & Sublett, 1936) § 5105; W. Va. Code Ann. (Michie & Sublett, 1937) § 4709.

and necessary for suits of either party, without regard to the domicil of the wife,⁵¹ whether or not it be recognized elsewhere or for other purposes.

(c) *Admission of separate domicil for married women.* During the second third of the nineteenth century, the courts in the United States successively began to acknowledge the capacity of a married woman to acquire a separate domicil in a steadily increasing number of situations. Ultimately, even the most conservative courts acceded to this for the purpose of bringing a suit or being sued, for divorce.⁵² Consequently, American courts and statutes no longer distinguish, for this purpose, between husband and wife but treat them equally as parties. Despite the diversity of the clauses—there are seventeen different kinds⁵³—in all jurisdictions, suit for divorce can be brought by the plaintiff at his own domicil.⁵⁴ Optionally, it can be instituted in most states also at the domicil of the defendant by a non-resident plaintiff.

The theoretical basis of all this is traditionally attributed to the conception that every state has an eminent interest in the status of its domiciliaries and is thereby entitled to alter the married status of a person domiciled in the state, even though the other party may be domiciled in another.⁵⁵ Thus, the marriage status of one spouse is treated in the same manner as the marriage of a married couple was under the older doctrine. In the words of a New Jersey decision of 1934, the husband's or the wife's domicil "carries with it the complete (marital)

⁵¹ Germany: Code of Civ. Proc. § 606 par. 1; cf. the Netherlands: BW. art. 262 par. 1.

⁵² 1 BEALE § 28.2.

⁵³ 2 VERNIER § 81.

⁵⁴ *Haddock v. Haddock* (1906) 201 U. S. 562; *Stevens v. Allen* (1916) 139 La. 658, 71 So. 936; *Perkins v. Perkins* (1916) 225 Mass. 82, 113 N. E. 841; *Re Ellis* (1893) 55 Minn. 401, 56 N. W. 1056; *Jones v. Jones* (1889) 67 Miss. 195, 6 So. 712; *Blakeslee v. Blakeslee* (1917) 41 Nev. 235, 168 Pac. 950; *Hubbell v. Hubbell* (1854) 3 Wis. 662.

⁵⁵ See 1 BEALE at § 10.8, 110.1.

res or a part of it," so as to give the state court jurisdiction.⁵⁶ How can this be? Vreeland may well ask:

"Since the status is that of two persons, and not one, does the wife upon acquiring a new domicile take half of the *res* with her and leave half with the husband, or does it all stay where it last was, or do they both have a sort of tenancy by entirety in the *res* . . . ?"⁵⁷

On the practical side, we are made aware by Goodrich that, merely as a matter of logic, the out-of-state spouse would not be affected, but consistency compels the courts to assume further that the divorce destroys also the married status of the non-domiciled party.⁵⁸ In counterpoise to this convincing reasoning, we may remark that the Michigan statute allows its courts to divorce, in their discretion, any party who is a resident of the state and whose husband or wife has obtained a divorce in another state, whether the foreign divorce is valid or not.⁵⁹ The explanation given by the Michigan Supreme Court is that the courts of both domicils possess jurisdiction to grant divorces only "so far as the party resident within its own limits is concerned; if one proceeds first, there is no legal impediment to the other's taking like steps afterwards."⁶⁰

The fact is that the American divorce law has outgrown the doctrine of jurisdiction *in rem*. From the time that the wife acquired the power to assume a domicile of her own, duality of domicile as a basis for divorce jurisdiction has been possible, and all conceptions born of the ancient idea of marital unity have lost their sense. Domicil has remained an essential prerequisite of jurisdiction only insofar that, according to the best settled

⁵⁶ Webb v. Webb (1934) 13 N. J. Misc. 439, 178 Atl. 282.

⁵⁷ VREELAND 28.

⁵⁸ GOODRICH §§ 124, 125.

⁵⁹ Mich. Comp. Laws (1929) § 12728 [Mich. Stat. Ann. § 25.86]. Related but perhaps not identical statutes are in force in Florida, *cf.* Fla. Statutes (1941) § 65.04 and Ohio, *cf.* Ohio Gen. Code Ann. (Page, 1937) § 11979.

⁶⁰ Wright v. Wright (1871) 24 Mich. 179; *cf.* Van Inwagen v. Van Inwagen (1891) 86 Mich. 333, 49 N. W. 154.

rule of this unstable field, no jurisdiction is granted when neither of the spouses is domiciled within the state. The entire question depends upon the extent to which a state chooses to shoulder the responsibility of entertaining divorce suits, or to leave them to other states. Individual legislatures have tried to solve the problem in such a variety of ways as to indicate that there is no logical necessity to follow any of them.

Indeed, no exact analogy to the American doctrine exists elsewhere, and very few foreign regulations approach it. Even these cannot be compared with it without understanding that they deal with parties of foreign nationality, while in this country the law has been developed with American citizens in view and is applied to aliens with very few qualifications. The nearest parallel is afforded by the Swiss law. In Switzerland, jurisdiction is assumed at the instance of a plaintiff of foreign nationality if he is domiciled within the country, irrespective of whether husband or wife is suing and whether the defendant is a Swiss national or domiciliary.⁶¹ In France and other countries, the defendant spouse must be a domiciliary, but the husband's domicil determines that of the wife, except where she has been judicially separated.⁶² The Hague Convention allows an option for the domicil of the defendant where the parties have not the same domicil.⁶³ The general rule of reference to the defendant's domiciliary law is also resorted to by the Federal Supreme Court of Mexico in interstate divorces, in case the laws of the Mexican states determine jurisdiction for divorce differently (domicil of the husband, marital domicil, domicil of the deserted wife).⁶⁴

⁶¹ See BECK 404 no. 37, comment to NAG. art. 7h par. 1.

⁶² France: GLASSON et TISSIER, 5 *Traité de Procédure Civile* (ed. 3, 1936) no. 1609.

Belgium: *Novelles Belges*, 2 D. Civ. 144 no. 471.

⁶³ Hague Convention on Divorce of 1902, art. 5 no. 2 par. 1 sentence 2. The provision has prevailingly been understood so as to characterize the domicil of a party generally under his national law. See German RG. (April 5, 1921) 102 RGZ. 82, 84; LEWALD in 1 Strupp's *Wörterbuch des Völkerrechts und der Diplomatie* 469.

⁶⁴ Mexico: S. Ct. (Oct. 14, 1940) *Seman. Jud.* 1941.1.403.

Hence, we find the American law rather isolated. But the French practice sheds some light on one motive that is of universal validity. The French courts have proclaimed the doctrine that they must refuse to entertain jurisdiction over parties who are both of foreign nationality, at least if they have not their common domicile in France.⁶⁵ However, in practice jurisdiction is exercised when the defendant does not prove that he has maintained a foreign domicile at which he can be actually sued⁶⁶ or, in another version, when there is no foreign jurisdiction in which the suit can be prosecuted without hardship.⁶⁷ The desire to avoid what would look like a denial of justice, is a legitimate one among the many impulses for entertaining causes presented.

The reverse side of this obliging attitude was well known in this country from the wave of divorces of Americans in Paris until the decline of the 1920's.⁶⁸

The wider such "hospitality," the more conflicts are likely to appear. Conflicts are not even confined to that diversity of national and domiciliary divorce laws that has been receiving paramount attention in Europe. The different views, for instance, regarding the wife's domicile have the result that a court of Uruguay, predicated jurisdiction upon the matrimonial domicile, will divorce an American citizen domiciled in Montevideo from his wife who lives in the United States,⁶⁹ while a New York court, if the wife lived there, would probably consider her domiciled in the state and protected by certain special rules against the Uruguayan decree. A series of Canadian

⁶⁵ French Cass. (req.) (June 25, 1918) S.1918-19.1.206; Cass. (civ.) (Nov. 10, 1920) S.1923.1.129; Cass. (civ.) (April 30, 1927) S.1927.1.208.

⁶⁶ GLASSON ET TISSIER, *supra* n. 62.

⁶⁷ See French Cass. (civ.) (July 29, 1912) S.1913.1.425; Cass. (civ.) (Nov. 10, 1920) and Trib. civ. Nice (Dec. 6, 1920) Clunet 1923, 72ff.; Cass. (Dec. 30, 1930) Revue 1932, 111; cf. KUHN, *Comp. Com.* 170.

⁶⁸ See BATES, "The Divorce of Americans in France," 2 *Law and Cont. Probl.* (1935) 324; see also JACOB, "Problems of Divorce in France Incident to the Statutes of 1941," 28 *Iowa L. Rev.* (1943) at 309.

⁶⁹ Trib. Ap. Montevideo (Sept. 13, 1935) 36 *Rev. Der. Juris. Adm.* (1938) 210, Clunet 1938, 841.

decisions has invalidated decrees rendered in this country because the finding of domicile was in contradiction to the Canadian doctrines.⁷⁰ Where a Swiss court, assuming jurisdiction because of her separate Swiss domicile, had divorced a woman of Belgian nationality, a Belgian court denied recognition to the decree; not even for the purpose of jurisdiction could a Belgian wife have a domicile separate from her husband.⁷¹ Well known is the number of divorces unrecognized within the United States despite the Full Faith and Credit Clause of the Constitution.

Residence is sometimes taken as a substitute for domicile, particularly for the purpose of jurisdiction for limited divorce; ⁷² as such it may suffice.

We have now to investigate the additional rules that restrict the assumption of jurisdiction.

3. Restrictions on the Assumption of Jurisdiction

It is a comforting experience that modern legislatures have felt the need to limit their own domiciliary jurisdiction over divorce, partly for the express purpose of avoiding at least certain conflicts with other jurisdictions, partly with less distinct intentions to the same effect. However, these additional requirements are of a very different nature in this country from those on the European Continent.

(a) *Additional requirements.* In the United States, the prerequisite that one party or the plaintiff be domiciled in the state at the time of the commencement of the action, is usually accompanied by further qualifications. The statutes have varied and mixed the requirements so "as to defy classification," Vernier attests.⁷³ The author must confess that he has not succeeded so far in completely understanding the meaning

⁷⁰ See *infra* p. 493, n. 143.

⁷¹ Cass. (March 19, 1925) *Pasicrisie* 1925.1.179; Trib. civ. Bruges (March 4, 1936) *Pasicrisie* 1937-3.81.

⁷² With respect to the United States see 1 BEALE § 10.8, § 110.5.

⁷³ 2 VERNIER § 81 and p. 107.

of several such combined versions and would most welcome a thorough discussion of all these clauses by a more competent writer. It seems that there are three main statutory clauses:

Sometimes it is required that the parties have, at some time before suit, both lived in the state. This is obviously derived from the idea of the matrimonial domicile, upon return to which either spouse is entitled to sue the other.

A considerable number of various clauses emphasize the importance of the place and the time where the cause of action accrued. Of this group, certain are important as direct measures to reject petitions evasive of foreign divorce law and will be considered separately.

In their vast majority, the statutory clauses require a definite period of "residence" of that party whose domicile is decisive, previous to the filing of the action; almost always it is provided or understood that this period should immediately precede the suit. The period is from six weeks to two years in particular states and varies also in different cases. It may make a difference what the cause for divorce is. In linking the ideas just mentioned with the minimum residence requirement, the length of time is declared unnecessary or reduced, if the party, or both parties, lived in the state before, or lived there at the time when the cause of action arose, or if the cause occurred in the state, etc. A typical formula is presented in the Uniform Annulment of Marriage and Divorce Act of 1906, whose first provision gave jurisdiction:

"When, at the time the cause of action arose, either party was a bona fide resident of the state, and has continued so to be down to the time of the commencement of the action; except that no action for absolute divorce shall be commenced for any cause other than adultery or bigamy, unless one of the parties has been for the two years next preceding the commencement of the action a bona fide resident of this state."⁷⁴

⁷⁴ Proceedings of the Seventeenth Annual Conference of Commissioners on Uniform State Laws, Draft of an Act to Make Uniform the Law Regulating Annulment of Marriage and Divorce (1907) § 8(a).

As this wording shows, no exception is made in the case of both parties being domiciled in the state at the time of suit.⁷⁵ Similarly, in the great majority of the statutes no particular exception seems to be intended to that effect, although the requirement of residence may be released in related situations, such as where the defendant is personally served.⁷⁶ There are, however, a few statutes which state that actual domicile is sufficient, if both parties are domiciled in the state.⁷⁷

Disregarding the labyrinth of the statutory details, we may take it that the restrictions of the last type counter-balance the ruthlessness of divorce jurisdiction at the domicile of one party by qualifying this domicile in a possibly very effective manner. The requirement of residence previous to the suit is generally understood as meaning domicile and, in most jurisdictions, actual presence in the state as well, although a temporary absence is innocuous.⁷⁸ The lapse of time guarantees that the individual has become a participant in the life of the state and serves as evidence that the change of abode includes a serious change of domicile. If applied to the case where both parties have come to the state, the requirement is intended to foil evasive demands as well as to protect one spouse against the other's arbitrary choice of the forum. In both applications, the requirement is usually held to be mandatory.⁷⁹

Unfortunately, the great purpose of this restriction has often been forgotten. It is buried under the maze of confusing details accumulated in the various statutory experiments. Moreover, two defects are rightly much criticized. While some states formerly demanded a residence of five years,

⁷⁵ Statutes formed after this model speak expressly of both parties.

⁷⁶ See, for instance, Iowa Code (1939) § 10470 (defendant resident and personally served).

Conn. Gen. Stat. (1930) § 5181.

⁷⁷ See especially Ala. Code Ann. (1940) tit. 34 § 29.

N. H. Rev. Laws (1942) c. 339 § 4.

In this sense, see also the Uniform Divorce Jurisdiction Act of 1930, § 1(a) (ed. 1932).

⁷⁸ 1 BEALE § 10.8.

⁷⁹ *Hetherington v. Hetherington* (1928) 200 Ind. 56, 160 N. E. 345.

an unjustifiably long period, others are content with three months, or, since the famous competition of Nevada with Idaho and Florida, with six weeks. It has become the only purpose of such a requirement to benefit the local hotels and shops. The other evil is lax enforcement of the normal residence period; strange stories have been told in the literature in this respect.⁸⁰

Could these faults be corrected, this dependence of jurisdiction on a residence period would be calculated greatly to inspire legislation in other countries where thus far a minimum period of residence has only occasionally been provided.⁸¹

(b) *Conformity to National Law.* In Europe, while as a rule jurisdiction over foreigners is taken at the matrimonial domicile or in some countries at the domicile of one party, measures are taken to avoid collision with the national law.

The Hague Convention. The Hague Convention,⁸² followed by the statutes of Sweden and Poland,⁸³ has recognized, in special clauses, the claim for exclusive jurisdiction of divorce, which today is asserted by such countries as Czechoslovakia, Hungary, and Poland.⁸⁴ If the jurisdiction of a state over petitions for divorce or judicial separation is exclusive for its nationals, such jurisdiction is recognized by the other states as the only one competent. The Belgian courts observe the same restraint in the absence of an enacted rule and without being bound any longer by the Hague Convention.⁸⁵

⁸⁰ BREARLEY, "A Note Upon Migratory Divorce of South Carolinians," 2 Law and Cont. Probl. (1935) 329, 332.

⁸¹ Poland: Law of 1926 on interlocal private law, art. 2 (one year for change of personal law).

Sweden: Law of March 23, 1934, Svensk Författningssamling 1934, no. 50, 8 Z.ausl.PR. (1934) 639 (one year in the case of a Swedish plaintiff).

France: the decree of Nov. 12, 1938, requiring a police permit for at least a year's residence for recognizing the domicile of a foreigner (*supra* p. 141) evidently is applicable to divorce.

⁸² Hague Convention on Divorce of 1902, art. 5 no. 2 par. 2.

⁸³ Sweden: Int. Fam. Law of 1904 with amendments, c. 3 § 1 par. 2.

Poland: Law of 1926 on international private law, § 17 par. 4.

⁸⁴ See *supra* p. 398.

⁸⁵ Cour Bruxelles (March 15, 1922) Belg. Jud. 1923, col. 103; Rb. Antwerp (Nov. 19, 1937) 8 Rechtsk. Wkbl. (1938-1939) col. 547 no. 112 and (March

Germany. The German law goes even further. German courts may not exercise jurisdiction in divorce cases where the national country of the husband would not recognize the resulting judgment because of lack of jurisdiction of the German forum. The German provision prescribes that, if both spouses are foreigners, action for divorce may be brought at the forum, provided that the domestic court has jurisdiction also according to the laws of the state of which the husband is a national. According to one opinion, this text requires that the national country should recognize also the specific court where the suit is brought as having jurisdiction.⁸⁶ Better authorities, however, declare it sufficient that any German court, this or another, be considered endowed with jurisdiction in the eyes of the national law, that is, that German courts have jurisdiction in the international sense.⁸⁷

The prohibition does not extend to the case where the resulting decree of divorce would not be recognized on another ground, for instance, because of lack of reciprocity or because of service of the defendant by publication.⁸⁸

This prohibition, however, covers many more cases than just those of exclusive jurisdiction mentioned above. It extends to all situations where one or both of the foreign spouses are domiciled in a country that does not recognize the effectiveness of the German decree within its borders. Similarly, exclusive jurisdiction has been claimed by many American cases for the courts of the domicile, and likewise by Switzerland, which does not recognize a foreign divorce of two Swiss citi-

29, 1939) 9 *ibid.* (1939-1940) col. 1373 no. 281; App. Bruxelles (May 20, 1939) 9 *ibid.* (1939-1940) col. 42 no. 7 (Hungarians).

⁸⁶ STEIN-JONAS-POHLE, 2 ZPO. (ed. 16, 1939) § 606 VI; RG. (Nov. 21, 1929) 126 RGZ. 353, JW. 1930, 1309; KG. (Oct. 25, 1937) JW. 1937, 3249, but cf. MASSFELLER, JW. 1936, 3579.

⁸⁷ SCHÖNDORF, 75 Jherings Jahrb. 66; RÜHL, JW. 1930, 1310; 3 FRANKENSTEIN 505; PAGENSTECHER, 11 Z. ausl. PR. (1937) 480.

⁸⁸ RG. (Nov. 21, 1935) 149 RGZ. 232; cf. KG. (Dec. 19, 1932) IPRspr. 1932, no. 76. On the application of the provisions to religious divorce forms, see below, p. 413. On the case of subjects of a country where divorce cannot take place except by bill of parliament, see NIBOYET 506 no. 417; *ibid.* 744 no. 636; 2 BERGMANN 79; RABEL, 5 Z. ausl. PR. (1931) 262.

zens, one of whom is domiciled in Switzerland.⁸⁹ Before assuming jurisdiction to divorce an American husband, a German court must therefore ascertain, among other points:⁹⁰ (1) where the husband is domiciled, under the American definition of domicile, requiring in particular the *animus manendi* in the American sense; (2) if he thus is found to be domiciled in Germany, whether the American conflicts rule recognizes the jurisdiction of the domicile, and as of what time.

This subject needs more discussion in connection with renvoi.

Switzerland. Still broader is the scope of the former Swiss⁹¹ and the Hungarian⁹² provisions that require not only the jurisdiction but also the decree to be recognized by the national law, insofar as the acting court is able to predict.⁹³ Also, the Court of Appeals in Zurich was denied jurisdiction, because personal service on the defendant was impossible and German courts, under the German-Swiss treaty on mutual recognition and execution of judgments,⁹⁴ therefore, would not have recognized the decree.

⁸⁹ BG. (Oct. 10, 1930) 56 BGE. II 335; BG. (May 13, 1938) 64 BGE. II 74, 78; cf. for more difficult situations, BECK, NAG. 363 nos. 112-115.

⁹⁰ Cf. in particular RG. (Nov. 21, 1929) 126 RGZ. 353, IPRspr. 1930, no. 136.

⁹¹ NAG. art. 7h par. 1.

⁹² Hungarian Marriage Law of 1894, § 116: . . . if the judgment has force in the state whose citizens the spouses are.

⁹³ App. Zürich (Jan. 11, 1936) Bl. f. Zürich. Rspr. (1936) 359; the treaty is that of Nov. 2, 1929. App. Zürich (1937) 38 Bl. f. Zürich. Rspr. (1939) 78 no. 36 denies jurisdiction to the wife, because, under the applicable Polish law, she shared the domicile of her husband who lived in Antwerp, Belgium. Similarly, in the case of a wife suing her British husband domiciled in Canada, 37 SJZ. (1940-1941) 31 no. 5.

⁹⁴ Examples regarding American citizens: Bez. Ger. Zürich (June 18, 1930) 27 SJZ. (1930-1931) 87, no. 14 (wife under medical treatment in Zürich, intending to stay "permanently" in order to study there). Jurisdiction was granted in view of the husband's submission to the court and the certainty that the decree would be recognized in Minnesota). Same court (Nov. 3, 1931) 28 SJZ. (1931-1932) 250 no. 217 (the wife paid taxes and attended classes at the University. The husband in Boston consented to the separate domicile. The divorce ground would also be recognized in Massachusetts). In both cases the assumption of domicile was questionable, but the husband's consent to its establishment would be termed decisive. The same observations are true for a case of British subjects, Bez. Ger. Zürich (Oct. 25, 1935) 32 SJZ. (1936) 202, no. 41.

There is some uncertainty in applying either of these self-imposed restrictions, due to the difficulties of knowing exactly the position of the foreign law. The possibility that the national court in reviewing the decree will even re-examine the jurisdictional facts further aggravates the problem. The Swiss law was therefore significantly changed in the wording of its provision. Former article 56 of the Swiss Law on Civil Status required proof that the future judgment would be recognized in the homeland. As this was found to be an impossible task, the actual text (NAG. art. 7h par. 1) demands proof only that the Swiss jurisdiction would be recognized. But it is not clear whether by this change the evidence has been made easier to produce. Once, a Swiss court tried to consult the Supreme Court of the United States on the "American" divorce law but was informed that neither courts nor administrative agencies in this country are prepared to give advice.⁹⁵ At any rate, the court can only guess at the chances of recognition, if it does not want to refuse to assume jurisdiction in virtually every case, and experience shows that no court wants that.

In some cases, it may be suspected that Continental courts have too lightly presumed American and especially English willingness to recognize a domicile at and, therefore, jurisdiction of, the forum.

4. Religious Divorce

When a court applying the rule of nationality finds that under the national law of a party divorce can be pronounced only by an ecclesiastical authority (as in the countries influenced by the Greek Orthodox Church and by Islam), the court faces the problem whether it may exercise jurisdiction or must refrain from it. The German courts feel prohibited from assuming jurisdiction by the provision that jurisdiction must be in accordance with the national law of the husband,

⁹⁵ BURCKHARDT, 4 Schweizerisches Bundesrecht 142 no. 1674 II.

for a national law giving exclusive powers to the churches is deemed to exclude any judicial activity of temporal tribunals,⁹⁶ even abroad.

In France, jurisdiction was likewise denied, especially by the Supreme Court in the famous case of *Levinçon*,⁹⁷ a Russian Jew. Since the Russian law at the time left divorce proceedings to the religious authorities, a French court was held unable to apply the national law of the party in its true form without injury to the religious feelings of the parties. This example was followed by many other French decisions, most of which had to deal with subjects of the former Russian parts of Poland and Lithuania.⁹⁸

In France, however, some courts and writers have expressed contrary opinions, mainly because of the hardship imposed on the parties but also because of two legal arguments. First, public policy is invoked on the ground of the declared neutrality of the French state toward the churches and the impropriety of granting more prerogatives to foreign churches than to its own.⁹⁹ Second, religious divorce rules are analyzed as composed of substantive rules, concerned with the permissibility and the causes of divorce, and procedural rules giving way in a French tribunal to the French rules of procedure.¹⁰⁰

⁹⁶ KG. (Dec. 19, 1905) 14 ROLG. 241, aff'd RG. (Oct. 4, 1906) 19 Z.int.R. (1909) 263; RG. (Feb. 21, 1925) Clunet 1925, 1055. This is also the meaning of the Hague Convention on Divorce, and Actes de la Troisième Conférence de la Haye (1900) 211. An analogous position was taken in Switzerland by the Trib. Zürich (Sept. 22, 1936) 34 SJZ. (1937-1938) 313 no. 591, although in the instant case jurisdiction was assumed because the marriage was void under the national (Palestine) law.

⁹⁷ Cass. (civ.) (May 29, 1905) D.1905.1.353, S.1906.1.161, Clunet 1905, 1006, Revue 1905, 518.

⁹⁸ Cass. (civ.) (Oct. 30, 1905) S.1911.1.581; Cass. (req.) (July 20, 1911) S.1912.1.132; about ten decisions from 1920 to 1927 cited by J. DONNEDIEU DE VABRES 485; Trib. civ. Seine (Oct. 15, 1936) Nouv. Revue 1936, 541. Similarly in Belgium: Trib. civ. Bruxelles (June 25, 1930) Pasirisie 1931.3.36; see also POULLET 489 no. 378; Trib. civ. Bruxelles (Dec. 6, 1939) J.d.Tr. 1940, col. 120 (Spanish Catholics).

⁹⁹ Trib. civ. Seine (June 11, 1921) Clunet 1921, 525 (Greek Orthodox Russians); Trib. civ. Seine (Dec. 24, 1921) Clunet 1922, 117 (Russian Jews).

¹⁰⁰ See in this sense BARTIN's note to the decision of Cour Paris (March 17, 1902) D.1903.2.49 and (implicitly) Trib. civ. Seine (Feb. 25, 1937) Clunet

A recent Belgian critic of the dominant doctrine remarks that neither the consistories of the Orthodox Church nor the rabinate tribunals use any *formule sacrée*, prayers or deprecations; they exercise purely judicial functions.¹⁰¹ Courts of other countries, too, are divided on the question.¹⁰²

The role of the religious element under the national law, however, may be less important. The Austrian Civil Code, still in force in some countries, prescribes that Jews are to be divorced in court but that in the case of a mutual divorce agreement a preliminary attempt at conciliation must be made by the priest or teacher.¹⁰³ The Marriage Law of 1836 of the Warsaw District requires as a preliminary to court proceedings a certificate of a rabbi on the ecclesiastical aspect of the case.¹⁰⁴ French and German courts have considered such regulations no obstacle to litigation at the forum.¹⁰⁵ They find it more dif-

1937, 523 (Lithuanian Jews); PILLET, 2 *Mélanges* 359, 373; NIBOYET 867 no. 752. App. Alger (March 7, 1898) *Clunet* 1898, 1102 (separation of Spanish Catholics); Trib. civ. Toulouse (June 8, 1938) *Revue Crit.* 1939, 105 (Russian-Polish Jews).

¹⁰¹ JOFÉ, 22 *Revue Inst. Belge* (1936) 140.

¹⁰² Belgium: for exercising jurisdiction under application of substantive Belgian law: Trib. civ. d'Anvers (May 30, 1936); *cf.* 65 *Revue Dr. Int.* (Bruxelles) (1938) 295, and Cour Bruxelles (June 22, 1938) *J.d.Tr.* 1938, no. 3550 col. 646 (Polish Jews); JOFÉ, "Divorce de Polonais en Belgique," 45 *Pand. Pér.* (Jan. 1938) 5.

For denying jurisdiction: Trib. civ. Bruxelles (June 25, 1930) *Pasicrisie* 1931.3.36 (Spanish Canon marriage—no divorce possible); App. Bruxelles (July 9, 1932) *Revue* 1933, 511; Trib. civ. Bruxelles (June 25, 1930) *Clunet* 1932, 487, 489; Trib. civ. d'Anvers (March 1, 1939) *Pasicrisie* 1939.3.76; also POULLET 489 no. 378; VAN HILLE, 65 *Revue Dr. Int.* (Bruxelles) (1938) 295.

Italy: for exercising jurisdiction: Trib. Roma (June 22, 1898) *Giur. Ital.* 1898, I, 2, 647 (separation of Spanish Catholics married according to canonic formalities); for denying jurisdiction: App. Roma (June 6, 1899) *La Legge* 1899.2.45.

¹⁰³ Allg. BGB. §§ 133, 134.

¹⁰⁴ Marriage Law, Kingdom of Poland, art. 189, as generally interpreted. Although art. 196 of the Code requires ecclesiastical jurisdiction also for Catholics and Protestants, the German LG. Bremen (May 8, 1934) *JW.* 1934, 2353, *IPRspr.* 1934, no. 55, concluded from the Polish international private law of 1926 that jurisdiction should be assumed, and tried to apply the rules of both these churches to a mixed Catholic-Protestant marriage.

¹⁰⁵ France: Trib. civ. Strasbourg (Oct. 22, 1930) *Clunet* 1931, 166, *Revue*

difficult to adjust their own procedure to the singular presuppositions of the foreign laws. But some courts have even agreed to recognize the activities of local religious authorities corresponding to the foreign customs.¹⁰⁶

The sacrifices involved in such concessions to foreign claims are admirable instances in the development of international cooperation. But they originated from such a superstitious belief in the legitimacy of the nationality principle, that the most unreasonable of all its claims, that for exclusive jurisdiction over emigrated married couples, was not questioned. Foreign law must not be recognized, unless it is fit for international use.

III. COMMON SCOPE OF THE *Lex Fori*

To evaluate the domain of choice of law in the countries observing the personal law, it is necessary to go beyond the question of jurisdiction and to realize that important questions are everywhere governed exclusively by the law of the forum.

1. Procedure

Procedure, of course, is the concern exclusively of local rules. The law of the forum determines the necessity of con-

Crit. 1935, 753; Trib. civ. Metz (May 20, 1931) Clunet 1932, 165, 644, Revue Crit. 1935, 754 (Russian-Polish Jews).

Germany: RG. (Feb. 15, 1926) 113 RGZ. 38; RG. (May 20, 1935) 147 RGZ. 399; KG. (Dec. 11, 1933) JW. 1934, 619, IPRspr. 1934, no. 50 (Russian-Polish Jews), overruled see *infra* n. 106.

Of Greek Jews, the Greek laws do not speak; cf. CARABIBER, 6 Répert. 430 nos. 95, 96; but in view of the entirely judicial and temporal procedure in Greek legislation following Law no. 3222 of August 28-30, 1924, the Cour Paris (Dec. 29, 1925) Revue 1929, 258 has granted jurisdiction.

¹⁰⁶ France: Cour Paris (Jan. 15, 1925) Revue 1925, 358; Trib. civ. Metz (May 20, 1931) Clunet 1932, 165, 644, Revue Crit. 1935, 754. *Contra*: Cass. (req.) (July 20, 1911) S.1912.1.132; App. Rabat (May 9, 1933) Revue Crit. 1934, 125 (whether a French Algerian Jew has to give a religious bill of divorce); AUDINET, Revue Crit. 1935, 756.

Belgium: App. Liège (June 26, 1934) Nouvelles Belges, 2 D. Civ., Divorce 371 no. 1715 (certificate of the Grand Rabbi of Belgium accepted).

Germany: OLG. Köln (Jan. 20, 1932) JW. 1932, 2304, IPRspr. 1932, no. 78; KG. (Dec. 11, 1933) JW. 1934, 619, IPRspr. 1934, no. 50. *Contra*, overruling this practice, RG. (May 20, 1935) 147 RGZ. 399.

tested and the permissibility of uncontested proceedings, as well as the acts constituting procedure.¹⁰⁷ Provisional decrees for separate residence or maintenance rendered during a divorce suit also follow the procedural rules.¹⁰⁸

2. Decrees

The law of the forum controls the form in which a divorce is granted, if at all, including the choice of the persons or authorities entrusted with granting divorces.

In certain countries, divorce is granted by the king or an administrative authority,¹⁰⁹ in others by the parliament,¹¹⁰ often by ecclesiastical tribunals,¹¹¹ or it is a private agreement between the parties either with or without some religious¹¹² or public control.¹¹³ Whatever form divorce has in a country for its own subjects, is also permitted between foreigners. Divorce, conversely, if allowed at all, must not be granted to foreigners according to formalities nor by persons, other than those prescribed for subjects of the forum. Hence, religious

¹⁰⁷ Deviating from this principle, the Appeal Court of Paris in *Affaire Chiger*, Cour Paris (April 30, 1926) *Clunet* 1926, 943, *Revue* 1927, 243 declared that a French court could appropriate the power to determine causes for divorce in its discretion, a power provided for by the Soviet Russian law of the time, with respect to a controversial divorce between Soviet Russian nationals. This decision was much criticized; cf. BARTIN, 2 *Principes* 302, 303.

¹⁰⁸ Hague Convention on Divorce, art. 6; Poland: Law of 1926 on international private law, art. 17 par. 4 sentence 2, for comment, see KAHN, 2 *Abhandl.* 360 ff.

¹⁰⁹ Denmark, Norway, Czechoslovakia in limited cases, police judge in England.

¹¹⁰ Only way for the inhabitants of Newfoundland: also those of Eire and Quebec, but divorce is known to be unobtainable in both these countries. Judicial decrees replaced Parliament bills in Ontario by the Divorce Act (Ontario) 1930, 20-21 Geo. V, c. 14 of the Statutes of Canada, 1930; Northern Ireland by Matrimonial Causes Act (Northern Ireland), 1939, 2 & 3 Geo. VI, Publ. Gen. Acts of 1939, c. 13; and in the Isle of Man by Act of 1938.

¹¹¹ Albania, Bulgaria, Yugoslavia, Greece (since Law no. 3222 of 1924 for Mohammedans only and perhaps Jews), Lithuania. With respect to limited divorce: Italy, Spain, and Colombia.

¹¹² Jewish law as mostly in use in Palestine and some eastern European countries. The rabbis assist in varying degrees, but under the provisions of the Austrian Allg. BGB. of 1811, § 134, and the Marriage Law of the Kingdom of Poland of 1836, art. 189, the final decrees are rendered by the courts.

¹¹³ Soviet Russian and Mussulman countries excluding Turkey.

and private divorces are out of the question in the United States,¹¹⁴ as well as in Western and Central Europe. French and German courts annulled scores of divorce decrees rendered in their territories by religious authorities, especially in cases of Czarist Russians of various denominations, Polish Jews, members of the Orthodox Church, and others.¹¹⁵ For instance, a divorce of a Yugoslav and a Russian of Greek Orthodox faith by the Orthodox diocesan council in Paris was annulled by the *Tribunal de la Seine* in 1930.¹¹⁶

This, of course, is a purely negative proposition, leaving unsolved the dilemma whether such persons should be granted divorce according to the formalities of the forum or denied divorce on the grounds of lack of jurisdiction because their personal law requires religious proceedings.¹¹⁷

¹¹⁴ Chertok v. Chertok (1924) 208 App. Div. 161, 203 N.Y.S. 163 (divorce decree by the rabbi of Brooklyn granted to a husband in New York against his wife living in Russia, held invalid despite recognition by the Russian Government); *In re Spiegel* (S.D.N.Y. 1928) 24 F. (2d) 605.

¹¹⁵ Belgium: Trib. Liège (March 21, 1929) Belg. Jud. 1929, col. 428 (decree by rabbi in Louvain).

France: Circular of the Garde des Sceaux of April, 1909, prohibiting the recording of divorces granted in France by any judge without civil powers, an abuse then often committed; Cour Paris (June 21, 1910) Revue 1910, 837; Cour Paris (Oct. 31, 1910) Revue 1911, 82; Cour Paris (Dec. 26, 1912) Revue 1913, 424; Trib. civ. Seine (Nov. 20, 1920) Revue 1921, 226 at 236; Cour Paris (March 23, 1922) and (May 10, 1922) Revue 1923, 425; Cour Paris (Jan. 15, 1925) Revue 1925, 358; Cour App. Nancy (June 17, 1922) Revue 1922-23, 435; Cour Colmar (May 23, 1931) Clunet 1933, 97.

Germany: Law of Jurisdiction of 1877 (Gerichtsverfassungsgesetz) RGBl. 1877, 41, § 15 par. 3 declares that the exercise of ecclesiastical jurisdiction in temporal matters is without civil effect. This applies especially to marriage and divorce. RG. (April 21, 1921) 102 RGZ. 118; RG. (Feb. 15, 1926) 113 RGZ. 41; KG. (Dec. 16, 1920) Warn. Rspr. 1921, no. 35; RG. (Feb. 21, 1925) Warn. Rspr. 1925, no. 133; KG. (Dec. 21, 1931) IPRspr. 1931, no. 143; KG. (March 21, 1932) IPRspr. 1932, no. 77 (*privilegium Paulinum* recognized by the Marriage Law of Warsaw (Kongresspolen) of 1836, art. 207); OLG. Kiel (Nov. 30, 1926) 91 Schlesw. Holst. Anz., N.F. (1927) 145 (repudiation under the law of Russian Jews); LG. Berlin (Oct. 19, 1937) JW. 1938, 2402 (sending of divorce bill by a Russian Jew from Germany to Russia ineffectual under German law).

Switzerland: Justice Dept., BBl. 1937, III 141 no. 9 (divorce by the Council of the Russian Orthodox Church in France, invalid in France and Switzerland).

¹¹⁶ Trib. civ. Seine (June 2, 1930) Clunet 1931, 1078.

¹¹⁷ See *supra* pp. 413-416.

Exceptions to the principle of exclusive municipal formalities are very rare.¹¹⁸ Even a consulate of a foreign power is not usually allowed to grant divorces; apparently, the only exception is contained in the German-Russian Treaty of October 12, 1925, which permitted Russians married before a Russian consulate in Germany to divorce by mutual agreement in accordance with Soviet law of formalities but with recordation thereof at the same or another Russian consulate in Germany.¹¹⁹

Domestic law also defines the wording of a divorce decree. German courts have often considered, however, whether they should insert in a decree divorcing foreign parties the statement required by the German Civil Code declaring which party is in fault. The Reichsgericht finally decided that the judgment should omit this statement only when it is either prohibited by or would be of no significance under the personal law.¹²⁰

3. Validity of the Marriage Prerequisite

Apart from some confusion between divorce and annulment,¹²¹ a universal prerequisite for divorce is that the marriage be considered valid at the forum or, if voidable, at least provisionally valid. When, in the eyes of the court, the mar-

¹¹⁸ For Russian subjects of Armenian origin and faith, the Rumanian Cassation Court recognized a divorce rendered by the Bishop of the Gregorian Church in Bucharest, Cass. (May 13, 1935) Pand. Române 1936.I.57; *contra*: POSSA, 5 Giur. Comp. DIP. 359 no. 134, in view of the secularization of divorce by the Rumanian constitutional laws.

¹¹⁹ See Final Protocol of the German Russian Treaty of Oct. 12, 1925, German RGBl. 1926, II 60 at 82.

¹²⁰ RG. (April 18, 1918) Warn. Rspr. 1918, no. 189; RG. (Feb. 24, 1928) Warn. Rspr. 1928, no. 64. KG. (March 13, 1931) IPRspr. 1931, no. 81; KG. (June 27, 1932) IPRspr. 1932, no. 86, etc., confirmed as steady practice, KG. (May 30, 1938) JW. 1938, 2750; and after the Matrimonial Law of 1938 went into effect, see KG. (Aug. 11, 1938) referred to in JW. 1938, 2750 n. 1. Cf. for Dutchmen, KG. (April 9, 1934) IPRspr. 1934, no. 47, but also OLG. Düsseldorf (Nov. 21, 1933) JW. 1934, 437, IPRspr. 1934, no. 48. Correspondingly, Switzerland: BG. (June 13, 1912) 38 BGE. II 43 advised Swiss courts to state culpability in the case of German spouses.

¹²¹ See *infra* p. 535.

riage never existed or has already been dissolved, there is no subject matter for the proceeding to dissolve the marriage tie. On the other hand, if the marriage is recognized in the forum, it is immaterial whether it is recognized in the country to which the parties belong.

A significant application of this principle is the case of a so-called *matrimonium claudicans* (limping marriage) celebrated either at the forum or abroad under circumstances warranting its recognition as valid at the forum, which is considered invalid under the personal law because of formal or intrinsic defects. If, for instance, without a religious ceremony a Bulgarian married a French woman in Paris before a civil official, the marriage, valid and dissoluble in France, would be null and therefore indissoluble in Bulgaria.¹²² In such case, the countries that ordinarily take the personal law into consideration disregard it. When the parties marry within the forum, consistency and dignity of the jurisdiction require that the forum stand upon the validity of the marriage.¹²³

Thus, a marriage annulable in the home country of the party involved may be dissolved in the country of its celebration, each court taking the only way available for the termination of the marriage ties.

The German courts have made it clear that in these cases the law of the forum alone is to be applied and the personal

¹²² Cf. J. DONNEDIEU DE VABRES 450.

¹²³ Belgium: Trib. civ. Bruxelles (May 2, 1923) *Pasicrisie* 1923.3.133, Clunet 1924, 1098 (Russian-Polish Catholic).

France: Trib. civ. Seine (Nov. 19, 1920) Clunet 1921, 184, *Revue* 1922-1923, 306; cf. also 6 *Répert.* 431 no. 97 (civil marriage of an Orthodox Greek); Trib. civ. Seine (Feb. 15, 1922) Clunet 1922, 396 (Polish Jew married to Catholic French woman before registrar in Brussels).

Germany: RG. (Dec. 17, 1908) 70 RGZ. 139, 143; RG. (Nov. 16, 1922) 105 RGZ. 363 (Czarist Russians married in conformance with temporal formalities in Germany); RG. (Oct. 1, 1925) JW. 1926, 375, Warn. Rspr. 1926, no. 15 (Orthodox Greek married to a Norwegian girl in Norway, the marriage being recognized in Germany under the law of the place of celebration, EG. art. 11 par. 1 sentence 2); OLG. Dresden (Nov. 9, 1933) JW. 1934, 1740, IPRspr. 1934, no. 46; RG. (Nov. 7, 1935) Warn. Rspr. 1935, no. 192; KG. (Jan. 14, 1937) JW. 1937, 961; LG. Berlin (Nov. 2, 1937) JW. 1938, 395, Clunet 1938, 824; and other decisions, see *infra* n. 124.

Switzerland: App. Bern (May 30, 1923) 60 ZBJV. (1924) 40.

law entirely ignored.¹²⁴ It is not feasible, for instance, to apply to the divorce by analogy foreign rules of separation. The cases also have required adjustment of the ordinary jurisdictional rules¹²⁵ to meet the needs of the party interested in dissolution rather than annulment of the marriage.

In this latter respect, an analogous doctrine developed in England in cases *ex misericordia*. In *Stathatos v. Stathatos*,¹²⁶ a Greek, having married an Englishwoman at a registry office in London and taken her to Athens, sent her back to England; at his instance, the marriage was declared null in Athens, while it was undoubtedly valid in England. In this and another case,¹²⁷ English courts affirmed their divorce jurisdiction despite the lack of an English marital domicil. This doctrine of an exceptional domicil of the wife for the purpose of divorce was embodied in a statute of New Zealand¹²⁸ but is now deemed overruled in England.¹²⁹ The main remedy to

¹²⁴ RG. (Dec. 17, 1908) 70 RGZ. 144, cited *supra* n. 123; RG. (May 4, 1933) JW. 1933, 2582 (the decisive passage was published by LEWALD, *Revue Crit.* 1934, 663); KG. (Dec. 11, 1933) JW. 1934, 619, IPRspr. 1934, no. 50; KG. (April 20, 1936) JW. 1936, 2464; LG. Berlin (Nov. 2, 1937) JW. 1938, 395; LG. Berlin (Feb. 3, 1938) JW. 1938, 1273; OLG. Königsberg (Feb. 1, 1937) *Recht* 1938, 22 no. 194. This theory was advocated by LEWALD *III* no. 158, and *Revue Crit.* 1934, 661; SCHÖNDORF, 75 *Jherings Jahrb.* 53, 74; 1 FRANKENSTEIN 233 n. 189, 3 *ibid.* 425. *Contra*: RAAPE 401; also Hans. OLG. (Oct. 25, 1933) JW. 1934, 242, 16 Hans. RGZ. (1933) B. col. 683, *Revue Crit.* 1934, 661, and the French Cass. (civ.) (Oct. 30, 1905) *Revue* 1906, 730. See on the broader problem of "limping marriages," *supra* p. 233.

¹²⁵ According to the Hague Convention on Divorce, art. 5 no. 2 *in fine*, the foreign jurisdiction exists (even in the case of an exclusive jurisdiction claimed by the national courts) over a marriage with respect to which action for divorce or separation cannot be brought before the competent court of the national state.

Sweden: Int. Fam. Law of 1904 with subsequent amendments, c. 3 § 1 par. 2 final words. German OLG. Karlsruhe (June 13, 1933) JW. 1933, 1669.

¹²⁶ [1913] P. 46.

¹²⁷ *Montaigu v. Montaigu* [1913] P. 154.

¹²⁸ New Zealand: Divorce and Matrimonial Causes Amendment Act, New Zealand Statutes, 21 Geo. V, Session III (1930) No. 43 p. 248 sec. 3; *cf.* *Worth v. Worth* [1931] N. Z. L. R. 1109.

¹²⁹ *H. v. H.* [1928] P. 206; *Herd v. Herd* [1936] P. 205, 105 L. J. P. D. & A. 108 (the husband abandoned his English domicil of origin and lived in the United States; divorce denied the wife on ground of lack of jurisdiction of English court); *cf.* CHESHIRE 357; for Canada: HOGG, "Domicile of a Married Woman in Relation to Divorce," 6 *Can. Bar Rev.* (1928) 655, 666; FALCONBRIDGE, Annotation [1932] 4 D. L. R. 37.

free the parties from a marriage void in the homeland is now usually found in the recognition extended by English courts to any annulment decree that may be granted by the competent authority of the husband's domicile.¹³⁰ The same attitude has been recommended to the courts of Canada,¹³¹ and a similar position was taken in a recent Scotch case, in which a marriage with a Hindu was held valid in Scotland, though invalid in India. The Scotch court denied the application of the wife, who was living in Scotland, on the ground of lack of jurisdiction, although the court knew that she would be unable to prosecute litigation in India.¹³² The entire proposition seems very unsatisfactory. At the instance of the foreign party, a foreign annulment is recognized to the disadvantage of the wife, while the bond of marriage created by the law of the forum is disowned and the wife is denied on a purely formal ground the right to divorce.¹³³

IV. CHOICE OF LAW

I. *Lex Fori*

United States. The principle in the United States is that a divorce court applies the law of the forum to determine whether divorce is admissible, as well as whether the party's conduct or other event complained of constitutes a ground for divorce.¹³⁴

This system was shared, a century ago, by general European theory and practice. Savigny¹³⁵ supported the system by the belief that divorce law is imperative in nature, because it expresses moral conceptions purporting to be of absolute value.

¹³⁰ Unanimous opinion following the *Salveson* case, *infra* p. 543.

¹³¹ 2 JOHNSON 36-40.

¹³² *Watson-Mangrulkar v. Mangulkar* [1939] S. C. 239 (Session Case). Cf. *Thomson v. Thomson* (1935) Sc. L. T. 24 (Outer House of Ct. of Sess.).

¹³³ See KEITH, "Some Problems in the Conflict of Laws," 16 *Bell Yard* (1935) 15 and *supra* p. 234, n. 142.

¹³⁴ *Stewart v. Stewart* (1919) 32 Idaho 180, 180 Pac. 165; Restatement § 135.

¹³⁵ SAVIGNY § 379 no. 6.

Many writers and courts advocated the same idea.¹³⁶ This doctrine slowly disappeared, however, until, at the Hague Conference, it was found to have almost no proponents.¹³⁷

In this country, application of the *lex fori* seems to have been justified by the merely statutory nature of divorce, the effect of statutes being believed to be necessarily territorial—a theory going clearly back to such fathers of territorialism as D'Argentré and Ulricus Huber. It has also been advanced that divorce remedies are special or equitable and therefore cannot be exercised except by the courts of the state establishing the remedy. Sometimes there is invoked the general motivation for territorialism that, the "*res*" being located within the state, the state's interest prevails. It may be hoped that nowadays nobody cares seriously for all these artificial and worn-out assertions.

Neither are we any better served, when it is argued, especially in the Restatement, that "the law of the forum governs the right to divorce not because it is the place where the action is brought but because it is the domicile of one or both of the parties."¹³⁸ Story¹³⁹ and his contemporaries could properly propose such a theory with respect to the matrimonial domicile, whereby they had simply the husband's domicile in mind. To identify the law of the forum with that of the domicile is correct when divorce is rendered exclusively at the

¹³⁶ BURGE (ed. 2), 3 Colonial and Foreign Law 923; LAURENT, 5 Principes no. 185; 1 BROCHER 297; OLIVI, Revue 1885, 55; ASSER-COHN 67, French tr. by RIVIER (1884) 116; UNGER, 1 System 193 § 23 n. 126. This was the prevailing opinion in Germany before the Civil Code, see RG. (June 19, 1883) 9 RGZ. 191, NIEMEYER, Positives Intern. Privatrecht §§ 99, 100, and in 1 Z.int.R. (1891) 361, 2 Z.int.R. (1892) 473, 5 Z.int.R. (1895) 167, 168 n. 3; in former Austria, see OGH. (March 27, 1935) 8 Jahrb. Höchst. Entsch. nos. 1564, 1565; OGH. (May 27, 1935) 8 Jahrb. Höchst. Entsch. no. 1041; WALKER 722, 728, and 1 KLANG's Kommentar 324; in Czarist Russia, see MANDELSTAM, Clunet 1902, 490; in former Turkey, see Clunet 1903, 86, 96.

¹³⁷ The learned Norwegian delegate Beichmann, Actes de la Deuxième Conférence de la Haye (1894) 73, was the main advocate of the *lex fori*, but presented it as identical with the law of the domicile. Likewise, 1 BAR § 173.

¹³⁸ Restatement § 135 comment a.

¹³⁹ STORY § 229 a.

matrimonial domicil. The predication is manifestly wrong so soon as there are two domicils of the parties.

The reasonableness of the rule appears never to have been questioned. This alone, the unvarying application of the local statute in every American court, makes it clear that the principle of territorialism with its strong roots in the past common law has in fact here found one more expression. The spirit of independence and the need to sever an immigrant or settler from his former associations may have contributed to perpetuate this indifference to the outside world. As the story goes,¹⁴⁰ it was almost half a century before the potentialities of the Nevada statute of 1861, with six months' residence, for affording easy divorces on a large scale was grasped by a former New York attorney. Those early legislations were simple documents of pioneers. If so, we may wonder why under changed circumstances the application of foreign divorce law never has been taken into consideration, while the choice of law problem is so prominent in Europe and while also in this country the main purpose of conflicts law is perfectly acknowledged as being the achievement of uniformity in establishing the solution of a legal question irrespective of the forum.¹⁴¹ There may be, indeed, no positive reason at all but only a negative explanation for this result. At any rate, we cannot overlook the fact that the actual doctrine has no clear conceptual basis and that this lack of foundation has greatly contributed to the much deplored confusion and anarchy in this field.

Other countries. The law of the forum is openly applied to any person in Soviet Russia¹⁴² and in some Latin American countries,¹⁴³ upon the basis of the territorial principle. Also

¹⁴⁰ INGRAM and BALLARD, "The Business of Migratory Divorce in Nevada,"

² Law and Cont. Probl. (1935) 302, 305.

¹⁴¹ See *supra* p. 87.

¹⁴² MAKAROV, Précis 396 attests a uniform doctrine.

¹⁴³ E.g., see the declaration of the Colombian delegation in signing the Código Bustamante, 86 League of Nations Treaty Series (1929) 374; Venezuela: Cass. (June 15, 1914) Memoria 1915, 171, 172; Cass. (Feb. 21, 1921) Memoria

in Denmark, Norway, and Iceland, traditionally the law of the forum is applied, although the writers doubt whether it is not rather the law of the domicile that is applied, because usually divorce is not granted unless both parties are domiciled within the forum or both parties had their last domicile and one continues to live, within the country.¹⁴⁴ It might be advisable to construe soberly all these rules on the basis of territorialism and *lex fori* rather than in terms of the principle of domicile.¹⁴⁵ The manner in which specific problems are solved by prevailing practice is more in accordance with the *lex fori* principle. Also, the application of the American rule by Continental courts, resulting from the nationality principle and renvoi, is much simplified, if we understand it as based on the law of the forum.¹⁴⁶

Latin American treaties. On the other hand, the Treaty of Montevideo has unequivocally declared domiciliary law to determine not only jurisdiction for divorce¹⁴⁷ but also, in a provision correctly separated,¹⁴⁸ the right to divorce. The problem, it is true, appeared in its simplest form, since jurisdiction is exclusive for the court of the present or last matrimonial domicile.

1922, 162, 163. The recent law of Brazil (1942) does not mention separation in Brazil, but includes it in the "domiciliary" law applicable according to Lei de Introdução art. 7. ESPINOLA, 8-B Tratado 1066 asserts that in the case of different domicils, both laws must be attended concerning permissibility and causes of separation.

¹⁴⁴ Denmark: BORUM, Personalstatutet 490 n. 5; BORUM and MEYER, 6 Répert. 214 no. 8; *ibid.* at 220 nos. 48ff.; MUNCH-PETERSEN, 4 Leske-Loewenfeld I 747.

Norway: CHRISTIANSEN, 6 Répert. 575 no. 118.

Iceland: EYJÓLFSSON, 4 Leske-Loewenfeld I 762; LÖNING in 9 Z.ausl.PR. (1935) 407; see also German RG. (April 6, 1936) 151 RGZ. 103.

The Scandinavian Convention arts. 7, 9 starts from a primary rule that divorce is rendered at the matrimonial domicile, but states exceptions, and finally declares the law of the forum applicable.

¹⁴⁵ FALCONBRIDGE, Annotation [1932] 4 D. L. R. 36 prefers the domiciliary angle but concedes doubts on this point.

¹⁴⁶ *Infra* pp. 446ff.

¹⁴⁷ Treaty on international civil law, text of 1889, art. 62; text of 1940, art. 59. On restrictions of the principle, see *supra* n. 46.

¹⁴⁸ Treaty of Montevideo, text of 1889, art. 13b; text of 1940, art. 15b.

In the same way, the *Código Bustamante* clearly isolates the choice of law question and with one exception subjects the right to divorce to the law of the marital domicil.¹⁴⁹ This is a remarkable victory for the domiciliary principle, as usually the Havana Code does not decide which is the personal law.

2. Diverse Contacts

As an aftereffect of former conceptions,¹⁵⁰ divorce sometimes has been assimilated to the dissolution of ordinary contracts; as a matter of fact, all requisites of marriage in this country are considered governed by the law of the place of celebration, indicated by the historic rule for contracts. This idea has also played a role in determining the dissolution of marriage¹⁵¹ and continues to do so in a few countries. In particular, the Marriage Law of Argentina provides, in a section known for the incessant complications and doubts it has provoked in the world, that a foreign divorce of a marriage celebrated in the Argentine Republic does not entitle either of the spouses to remarry, if the divorce is inconsistent with the Code.¹⁵² This means, in the prevailing though con-

¹⁴⁹ Código Bustamante art. 52 (for the exception of art. 54, see *infra* p. 430).

¹⁵⁰ See *supra* p. 396.

¹⁵¹ PÜTTER, 3 Rechtsfälle, part 1, 80, 85, quoted by 1 BAR 486 § 173 n. 6, tr. by GILLESPIE 384 § 173 n. 10; Austrian Imperial Decree of Oct. 23, 1801, Justizgesetzsammlung no. 542; cf. WALKER 727 n. 14; D'OLIVECRONA in Clunet 1883, 343 at 359. For criticism of this theory, see STORY § 230a, and WEISS, 3 Traité 682. But it is the basis on which BARTIN, 2 Principes 323 § 318 advocates application of the national law of the husband at the time of the marriage.

Peru: The Supreme Court of Peru, in a series of decisions declared that a foreign marriage could not be dissolved for causes not recognized in the country of celebration. See Ej. (July 2, 1929) 25 Anales Jud. (1929) 78 (Japanese marriage) and cases cited by APARICIO y SÁNCHEZ, 8 Código Civil, Concordancias 70. *Contra* Ej. (June 20, 1936) 32 Anales Jud. (1936) 100 (consent divorce.) The C. C. of Aug. 30, 1936 seems to eliminate this practice.

¹⁵² Argentine Civil Marriage Law of 1888, art. 7, cf. art. 82. Divorces of Argentine marriages and foreign marriages must be distinguished, apart from the ordinary distinction of domestic and foreign divorces. Cf. the clear survey by ROMERO DEL PRADO, Der. Int. Priv. 313-320. A related provision of the Chilean C. C. art. 120 was adopted also by Ecuador: C. C. art. 116; El Salvador: C. C. art. 170; Uruguay: C. C. art. 103, and refers to all divorces granted abroad which the municipal law would not permit.

See *infra* n. 178.

tested opinion, that a foreign, e.g., Uruguayan, divorce of a marriage celebrated in Argentina is invalid in Argentina. The Treaty of Montevideo of 1889 implying this interpretation¹⁵³ invalidates such a divorce in all member states,¹⁵⁴ although Uruguay departs from this rule on the ground of public policy.¹⁵⁵ It is a fortunate concession to international needs that, in the new 1940 draft of Montevideo, Argentina acquiesced in the elimination of this extraterritorial effect of the law of the place of celebration; the proviso was changed into a mere reservation allowing the state of celebration to deny recognition to foreign divorces.¹⁵⁶

The Polish Supreme Court resorted to the law of the place of celebration to solve the problem arising from interprovincial conflicts,¹⁵⁷ while the Rumanian Supreme Court rejected this test.¹⁵⁸ The Supreme Court of Czechoslovakia seems to have returned to the idea.¹⁵⁹

Any reference to the place where the offence to marital duties was committed has long been abandoned in all countries.¹⁶⁰ But reference to the law of the place where the cause for divorce accrued is found in America in sporadic attempts to limit jurisdiction for divorce.¹⁶¹

3. National Law Cumulatively Applied with the *Lex Fori*

In most civil law countries, the two questions of jurisdiction and applicable law are distinguished as a matter of course, and, with respect to the latter, consideration is given to the *lex fori* in conjunction with the *lex patriae*. However, the approach varies.

¹⁵³ 2 VICO nos. 107, 108.

¹⁵⁴ Treaty on international civil law, art. 13b.

¹⁵⁵ See *infra* p. 480.

¹⁵⁶ Art. 15b.

¹⁵⁷ Polish S. Ct., Plenary decision (Oct. 9-16, 1937) 5 Z.osteurop.R. (1938-1939) 459.

¹⁵⁸ Rumania: S. Ct. (March 3, 1937) 4 Z.osteurop.R. (1937-1938) 320.

¹⁵⁹ See Sup. Ct. (Feb. 28, 1929) no. 8745 and (March 1, 1934) no. 13328, 10 Z.ausl.PR. (1936) 171; 1 BERGMANN 746.

¹⁶⁰ STORY § 230a; 1 BAR 487 § 173 n. 9a, tr. by GILLESPIE 385 § 173 n. 16.

¹⁶¹ See *infra* p. 454.

France and others. In France and the majority of other countries following the French Code,¹⁶² grant of divorce must accord with the national law of the parties and not contravene the forum's public policy understood in its broadest sense. The observance of the national law is the rule, and public policy intervenes as a basis for exceptions, the determination of which is left to the discretion of the courts and which therefore remain measurably uncertain.¹⁶³ In fact, they cover many, if not most, cases.¹⁶⁴

The Dutch courts, which started with this basis, seem now to apply exclusively Dutch divorce law, disregarding the personal law where they are not bound by the Hague Convention to consider it.¹⁶⁵ For the Netherlands, this is extraordinary.

In the German legislation, and those following its lead, viz., those of Sweden, China, and Japan, and by the unwritten law of Greece, divorce depends directly and concurrently upon conformity with the national law and the law of the forum.¹⁶⁶

¹⁶² France, Belgium, Luxemburg, Rumania, Portugal; and with respect to separation from bed and board, Brazil (until 1942), Italy and Spain and the more recent enactments of French and Spanish Morocco. See subsequent footnotes for cases. This system has been adopted by numerous Latin American writers, e.g., MATOS no. 258, *cf.* also no. 264.

¹⁶³ See NIBOYET 746; POULLET 491ff. no. 379; KOLLEWIJN, *Het beginsel der openbare orde* (1917) 90.

¹⁶⁴ NIBOYET, *Notions Sommaires* (1937) 187 no. 310 *bis*, even formulates a simple principle of cumulative application of the personal and the French laws, parallel to the German system.

¹⁶⁵ The decision of the Hooge Raad (Dec. 13, 1907) W. 8636, Clunet 1911, 1334 had attracted attention, as it applied Dutch law to American citizens domiciled in the Netherlands, not by *renvoi* but as the *lex fori*. *Cf.*, for instance, the criticism by KOLLEWIJN, *Het beginsel der openbare orde* 87. See the later decisions Rb. Amsterdam (Jan. 11, 1924) Clunet 1925, 1120; Rb. den Haag (April 7, 1932) W. 12661; Hof den Haag (June 22, 1933) W. 12715; Hof Amsterdam (June 27, 1935) W. 12956; Rb. Almelo (Jan. 22, 1936) W. 1937, no. 54 (Lithuanians); Hof den Haag (June 5, 1936) W. 1936, no. 1052 (Germans, after Germany had left the Hague Convention).

¹⁶⁶ Germany: EG. art. 17 par. 4. Divorce cannot be pronounced in this country upon the ground of a foreign law, unless it is permissible according to both the foreign law and the German laws.

Sweden: Int. Fam. Law of 1904 with amendments, c. 3, § 2.

China: Law of 1918, art. 11.

Japan: Law of 1898, art. 16.

Greece: App. Patras (1936) no. 171, Clunet 1937, 369; 2 STREIT-VALLINDAS

This system of cumulation was adopted by the Hague Convention.¹⁶⁷ Although in this group the domestic divorce law does not operate merely by way of exception, the rule refers, here too, to the national law in the first place, with the internal law controlling permissibility and causes for divorce. Hence, also under these statutes, the divorce decree is founded on the foreign law.

Under the Swiss statute, however, the roles are reversed; if both laws consent, divorce is "pronounced according to Swiss law."¹⁶⁸ The courts have concluded from this provision that Swiss law must be applied to all legal effects of divorce, such as alimentary obligations and guardianship over children.¹⁶⁹

V. APPLICATION OF THE NATIONALITY PRINCIPLE

1. Permissibility of Divorce and Grounds for Divorce Distinguished

The disposition of the Hague Convention relating to Divorce and Separation, that the granting of divorce or separation must conform with the national law of the parties as well as with the law of the forum, is in two parts:

"Art. 1. Married persons may apply for a divorce provided the law of the state to which they belong (national law) and the law of the place where the application is made both permit divorce.

"The same applies to separation from bed and board.

"Art. 2. Divorce may be granted only if obtainable in the particular case under both the national law of the spouses

¹⁶⁷ Hague Convention on Divorce of 1902, art. 1: "... provided their national law and the law of the place where the application is made both admit divorce."

¹⁶⁸ Swiss NAG, art. 7h last paragraph. Similarly, Belgian Congo: C. C. book 1 art. 13 par. 2.

¹⁶⁹ BG. (June 13, 1912) 38 BGE. II 43, 49; BG. (May 28, 1914) 40 BGE. II 305, 308; BG. (Nov. 27, 1918) 44 BGE. II 453, 454; BG. (Feb. 2, 1921) 47 BGE. II 6; BG. (Dec. 10, 1936) 62 BGE. II 265.

and the law of the place where the application is made, though on different grounds.

"The same applies to separation from bed and board."

There is nothing in the Convention to justify such a division of the rules, but this division had been established by the discussions of the Institute of International Law¹⁷⁰ and during the Hague Conference¹⁷¹ for the purpose of a differentiated regulation. The distinction has regained significance in the *Código Bustamante*; under article 52, the right to separation or divorce is governed by the law of the matrimonial domicil, while under article 54 the causes for divorce or separation are subject to the law of the place of suit, provided that the parties are domiciled in the forum. It is difficult to understand this provision.

Generally, such distinctions are made for the purpose of analytical discussion but without any intended contrast.¹⁷²

2. Permissibility of Divorce

(a) *Under the law of the forum.* Complete dissolution of the marriage bond is at present prohibited in South Carolina, Argentina, Bolivia, Brazil, Chile, Colombia, Ireland, Italy, Paraguay, and since 1938 again in Spain; also for Catholics in the countries observing the Austrian Civil Code—Liechtenstein, parts of Poland and Yugoslavia—and for Catholics under Czarist Russian law in other parts of Poland; and under canon law in Bosnia, Croatia, Montenegro, Serbia, Bulgaria, and parts of Lithuania.

¹⁷⁰ *Annuaire* 1887-1888, 125, the national law should govern the question whether or not divorce is allowed at all, and the law of the forum decides the grounds for divorce.

¹⁷¹ See *Actes de la Troisième Conférence de la Haye*, 1900, 193; KAHN, 2 *Abhandl.* 321.

¹⁷² In the Treaty of Montevideo on international civil law, text of 1889, art. 13b, it is required that "the alleged cause" be agreeable to the law of the place of celebration. This is too narrow an expression, as it must have been intended to include permissibility of divorce in the first place. This mistake was not corrected in the 1940 draft.

Although legislators generally do not envisage persons other than subjects of the forum, a divorce not granted to domiciliaries or nationals is not granted to foreigners. Religious and ethical reasons, as well as respect for the judicial institutions of the forum, motivate this rule. The rule, which was observed in France until divorce was reintroduced in 1884,¹⁷³ is in force in Spain,¹⁷⁴ Italy (with short interruption, however, much noticed during the preparation for the Hague Convention),¹⁷⁵ Brazil,¹⁷⁶ Argentina (though with considerable opposition),¹⁷⁷ and probably everywhere in the countries mentioned in the previous paragraph.

By an analogous rule, foreigners cannot obtain any form of limited divorce unknown to the forum. Whatever type of judicial separation short of complete dissolution of the marriage ties may be prescribed by the national law, no form of separation not provided by the law of the forum is granted. Where, for instance, no divorce other than absolute divorce is allowed, it is not possible to obtain any limited kind of separation. These principles, not so natural as they sound, as

¹⁷³ WEISS, 3 *Traité* 689ff.

¹⁷⁴ TRÍAS DE BES, 6 *Répert.* 255 no. 111.

¹⁷⁵ Following the contemporary trend toward permitting divorce of foreigners whose national law did not oppose it, divorces were granted to foreigners by App. Ancona (March 22, 1884) *Monitore* 1884, 365, *Giur. Ital.* 1884, II, 247; App. Genova (June 7, 1894) *Monitore* 1894, 784, *Giur. Ital.* 1894, I, 2, 554, *Clunet* 1898, 412; Trib. Milano (June 2, 1897) *Monitore* 1897, 514 and (June 30, 1898) *Giur. Ital.* 1898, I, 2, 765, *aff'd* App. Milano (Nov. 24, 1898) *Monitore* 1899, 64. But the last-mentioned decision was reversed by Cass. Torino (Nov. 21, 1900) *Monitore* 1900, 981; similarly, Cass. Firenze (Dec. 6, 1902) *Clunet* 1903, 910, and all later decisions, applauded by the writers; see BOSCO, 22 *Rivista* (1930) 461, 500; FEDOZZI 466 n. 3. On the sensation caused at the Hague meetings by this temporary liberalism, see KAHN, 2 *Abhandl.* 313ff. Among the other literature see 2 FIORE no. 689, generally followed in Latin America; see e.g., MATOS, no. 564.

¹⁷⁶ Brazil: Sup. Trib. Fed. (Sept. 18, 1920) App. civ. no. 2, 755, 23 *Revista Jur.* (1921) 496; Distr. Fed. (Sept. 1, 1932) per EDMUNDO DE OLIVEIRA FIGUEIREDO in 23 *Arch. Jud.* 478, *cf.* OCTAVIO, *Dicionario, Divorcio absoluto* 88 no. 408ff.; 2 PONTES DE MIRANDA 80 and 6 *Répert.* 166 no. 44.

¹⁷⁷ Argentine Civil Marriage Law of 1888, arts. 81, 82. There is opposition now to the rigidity of excluding divorce for foreigners; *cf.* ROMERO DEL PRADO, *Der. Int. Priv.* 314.

we shall see, may create real hardship. Nevertheless, the maxim is universal and fully adopted by the Hague Convention on Divorce (art. 1).

(b) *Under the national law.* By virtue of the nationality principle, divorce *a vinculo* is denied if the national law does not permit dissolution of a marriage during the lifetime of both spouses. If, for instance, an Italian subject were married to an Argentine bride in Argentina,¹⁷⁸ divorce cannot be obtained in Germany, because the husband's national law forbids it,¹⁷⁹ nor in France because neither national law allows it.¹⁸⁰

The question has been raised, however, whether, in a country having the institution of divorce, the public policy that regards the institution as based on morality and social sanity is so strong that it must oppose foreign prohibitions. When the temporary Spanish Republic had solemnly introduced dissolution of marriage, it seemed unbearable to refuse its benefits to any category of persons, even foreigners.¹⁸¹

¹⁷⁸ Case of Trib. civ. Seine (May 11, 1933) *Revue Crit.* 1934, 129. It is disputed in Argentine literature whether under the Argentine Civil Marriage Law of 1888, art. 82, a marriage celebrated in Argentina can be dissolved in a foreign country that has not signed the Montevideo Treaty, so that remarriage abroad is legal. The negative answer, presented by the decision in 100 *Gac. del Foro* (1932) 78 col. 2, and ROMERO DEL PRADO, *Der Int. Priv.* 319 (with CALANDRELLI, WEISS-ZEBALLOS, LLERENA) has been approved also by the Cámara civil de Apelaciones de la Capital (March 14, 1935) 49 *J.A.* 505, *Clunet* 1937, 124; see also SCHLEGELBERGER, 4 *Z.ausl.PR.* (1930) 756. The opposite view (GONZÁLEZ, MACHADO, LAFAILLE, ALCORTA, VICO, RÉBORA) has been said to be the prevailing opinion by a mistaken German author GOTTSCHICK in *JW.* 1930, 1827, who has been followed by numerous German decisions, such as those enumerated by 2 BERGMANN 8 n. 1 and KG. Berlin (Feb. 9, 1931) *IPRspr.* 1931, no. 68.

¹⁷⁹ EG. art. 17 par. 4. It makes no difference whether the marriage was celebrated in Germany, OLG. Hamburg (Sept. 2, 1936) *Hans.RGZ.* 1936, B 486 no. 171.

¹⁸⁰ Trib. civ. Seine (May 2, 1918) *Clunet* 1918, 1182; Cour Paris (April 30, 1926) S.1926.2.89, D.1927.2.1. Correspondingly, in Trib. civ. Seine (May 11, 1933) *Revue Crit.* 1934, 129 (see *supra* n. 178) a divorce granted to the parties in Uruguay was not recognized in France. Czechoslovakia: S. Ct. civ., nos. 6787, 9079; but *cf.* S. Ct. (March 1, 1934) no. 13328.

¹⁸¹ Republican Spain: Trib. Supr. (Jan. 27, 1933) 207 *Sent.* 56; *cf.* *Revue* 1933, 533, 24 *Rivista* (1932) 567.

Analogous decisions have occasionally occurred elsewhere.¹⁸² But prevailing opinions have preferred strict application of divorce prohibitions imposed on the parties by their national law.¹⁸³ It must be admitted that by this strict application the policy of permitting the dissolution of marriage appears weaker than its counterpart, the policy of inseparability of spouses.

(c) *Separation*. A further consequence of the nationality principle is that separation from bed and board, or judicial or administrative separation of any other kind, except provisional measures, depends upon the approval of such an institution by the national law of the parties.¹⁸⁴ Since, according to present general opinion,¹⁸⁵ the kind of separation granted must also conform with the law of the forum, doubts arise when each law has a form of limited divorce, but the forms are not identical. The varieties are numerous indeed.¹⁸⁶ But, apart from the very complicated problems caused in Germany by the creation of a particular type of "dissolution of the marital union" in the Civil Code of 1896,¹⁸⁷ problems which disappeared in 1938 with the abolition of this un-

¹⁸² Rumania: PLASTARA, 7 Repert. 68 no. 192 notes decisions both ways.

Belgium: Divorce to two Catholic Austrians was granted by App. Liège (Nov. 2, 1937) J. d. Tr. 1937, col. 672 no. 3512, 23 Bull. Inst. Belge (1937) 76; 24 *ibid.* (1938) 52; this decision joins several other Belgian manifestations of a liberal policy stronger than the usual; *cf. infra* ns. 217-219, 222.

¹⁸³ See, for instance, German RG. (Jan. 13, 1936) 150 RGZ. 61, Nouv. Revue 1937, 109; Belgium: Cass. (March 9, 1882) Pasirisie 1882.1.62, *cf.* POULLET 487 no. 377 and the foregoing notes 179 and 180.

¹⁸⁴ See for the late law of Brazil: JOSÉ F. MANSUR GUERIOS, "Desquite por mutuo consentimento," 53 Rev. Jur. Bras. (1941) 113, 114.

¹⁸⁵ Under the former pure theory of national law, the Trib. civ. Bruxelles (May 8, 1908) Pand. Pér. 1908.604 granted a separation on the mutual agreement of the parties according to the foreign law unsupported by the Belgian law.

¹⁸⁶ See for comparative legislation, ROGUIN, 1 Traité de droit civil comparé, le Mariage (1904) 237; BERGMANN, 2 Rechtsvergl. Handwörterb. 723.

¹⁸⁷ *Cf.* RAAPE 381; 3 FRANKENSTEIN 474; *cf.* also 3 FRANKENSTEIN 468. See LEWALD, 57 Recueil 1936 III 313 on the decisions of the highest Dutch and Swiss courts.

fortunate institution, few difficulties seem to have been encountered.¹⁸⁸

A much deplored result¹⁸⁹ of the double legal requirements concerning separation occurs in the numerous international situations where one of the legislations involved provides only for absolute divorce and the other only for separation, or where the spouses loyal to their faith or to their national legislation do not want the absolute divorce available at the forum. In these cases, neither form of relief can be conferred under the system of nationality.¹⁹⁰ The consequences are apt to include special inconveniences, especially when the parties, faced with barred doors at their domicile, are refused jurisdiction even in their homeland.¹⁹¹ A court having only absolute divorce, besides merely provisional orders, at its disposal, such as the Rumanian or the German tribunals,¹⁹² is unable to give any relief to parties for whom Italian,¹⁹³ Brazilian,¹⁹⁴ etc., law is considered applicable, al-

¹⁸⁸ Italians are separated in Switzerland; see decisions in 6 Z.ausl.PR. (1932) 836; 7 *ibid.* (1933) 644; 11 *ibid.* (1937) 656. In France, it was decided that the effect of a French separation of Italians should be determined by Italian law rather than French; see Cour Dijon (March 28, 1939) Clunet 1939, 634. Portuguese nationals before 1931 could be separated but not divorced in France; see Trib. civ. Seine (June 12, 1888) Gaz. Pal. 1888.1.902. Nationals of countries recognizing judicial separation may likewise obtain separation in Portugal; see CUNHA GONÇALVES, *Direito Civil* 696 (where also conversion of separation into divorce is treated).

¹⁸⁹ Cf. especially KAHN, 2 Abhandl. 330, 339, 342 (more violently than is justified by his strong position against the law of the forum) and WALKER 702.

¹⁹⁰ OLG. Kiel (May 16, 1934) JW. 1934, 2349, IPRspr. 1934, no. 59 (Danish law); RG. (Nov. 4, 1937) 156 RGZ. 106. Austrian separations from bed and board have been transformed, according to the Law of July 6, 1938, § 115 by a simple procedure and without instituting a new suit, into full German divorces between persons who have become German subjects, RG. (Dec. 15, 1938) 159 RGZ. 76.

¹⁹¹ Compare, for instance, Rumanian C. C. art. 216, and KAHN, 2 Abhandl. 339. But see WALKER 703.

¹⁹² Since 1938, no limited divorce has existed in Germany, but the situation was materially the same before, according to the opinion prevailing in the court decisions. See OLG. Breslau (Sept. 8, 1933) JW. 1933, 2400, IPRspr. 1933, no. 33.

¹⁹³ Compare PLASTARA, 7 Répert. 68 no. 195, and FEDOZZI 461.

¹⁹⁴ Just. Fed. Nictheroy (Oct. 31, 1922) 66 Revista Dir. Civ. (1922) 314; cf. OCTAVIO, *Diccionario* no. 319ff.

though these legislations allow separation from bed and board. Inversely, Italian courts deny such separation to Rumanian or German nationals, because the parties' national law does not provide separation. For the latter case, it was suggested that this hardship should be alleviated on the ground that the larger remedy is agreeable to the personal law, and some Brazilian courts have proceeded in consequence,¹⁹⁵ while others have been opposed.¹⁹⁶ Yet at the Hague Conference, it was answered that limited divorce is not a "minus" which may be subtracted from absolute divorce, but a different thing.¹⁹⁷

The Brazilian practice, previous to the law of 1942, was interesting. The courts in principle required agreement of the national laws of both parties for granting separation by mutual consent (*desquite amigavel*) but granted it also in three exceptional cases, viz., the case just mentioned of the national law allowing absolute divorce, the case of *renvoi*,¹⁹⁸ and the case where one party is of Brazilian nationality.¹⁹⁹ These decisions seem to retain authority in cases where foreigners are not domiciled in Brazil.

¹⁹⁵ The cases of this note and notes 196 and 198 have been kindly pointed out by Miss Magdalene Schoch, Harvard Law School. Rumanian spouses or husband: Ap. Pernambuco (1938) 115 Rev. dos Trib. 745; Ap. civ. São Paulo (1938) 116 *ibid.* 157; 126 *ibid.* 171; German spouses: Ap. civ. São Paulo (1941) 131 *ibid.* 243; Ap. civ. Rio de Janeiro no. 8260 (Jan. 13, 1942) 61 Arch. Jud. (1942) 314; Japanese husband: Trib. São Paulo (Dec. 4, 1931) cited by 2 PONTES DE MIRANDA 83.

¹⁹⁶ The Appellate Court of Paraná in Plenary Meeting of its chambers (June 6, 1941) 34 Paraná Jud. (1941) 59 adopting the nationality principle denied separation by consent to German parties. São Paulo (1941) 133 Rev. dos Trib. 152 (German husband, Russian wife; no *desquite* in Brazil, as both German and Russian law, in case she should have retained Russian nationality, do not provide separation).

¹⁹⁷ See documentation in OLG. Kiel (May 16, 1934) JW. 1934, 2349, IPRspr. 1934, no. 59.

¹⁹⁸ Sup. Fed. Ct. (1937) 112 Rev. dos Trib. 334 (*obiter dictum*); Ap. civ. São Paulo (1938) 118 *ibid.* 715; Ap. civ. São Paulo (1939) 123 Rev. dos Trib. 597 (Czechoslovakian law of husband applied as the German law of the wife refers also to that law).

¹⁹⁹ See *infra* n. 236.

3. Grounds for Divorce

Under the principle of *lex fori* or *lex domicilii* as well as under that of nationality, applied exclusively, the right to divorce is governed by one law. The English courts demonstrate how seriously they accept this doctrine by applying, on the one hand, only English law in any divorce suit in England and, on the other hand, by recognizing foreign divorce decrees of the matrimonial domicil without inquiring into what law was applied in the case. Similarly, when French courts adhered to the pure nationality rule, they granted divorce for reasons found in the national law but not in French law.²⁰⁰ This point of view still exists in some countries.²⁰¹ Of course, causes repugnant to the public policy of the forum are always excepted.

At present, however, courts in France and many other countries are disinclined to apply a foreign ground for divorce, unless it corresponds with a ground acknowledged in the forum.²⁰² Absolute identity, it is true, is not demanded. For instance, in the relations among the countries following the *Code Napoléon*, divorce for *injures graves* is granted without regard to the varying meanings of this term, which term is also held to correspond to gross insults, cruelty, or desertion,

²⁰⁰ See SURVILLE 440.

²⁰¹ The Polish Law of 1926 on private international law, art. 17 par. 1 declares the national law applicable without any qualifications.

Greece: Court of Athens (1937) no. 1952, 49 *Thémis* 473, *Clunet* 1939, 463 granting separation from bed and board to Italian nationals according to Italian law on a ground unknown in Greek law.

In Portugal: CUNHA GONÇALVES, 1 *Direito Civil* 692 thinks that outside of the Hague Convention a cause of the national law unknown to the Portuguese law suffices in principle.

²⁰² Belgium: Trib. civ. Verviers (March 7, 1932) 19 *Bull. Inst. Belge* (1933) 74 (Swiss parties; grave injury required by Belgian law must be proved, as well as disruption of the marriage by a lesser injury, ground for divorce under Swiss law).

France: Trib. civ. Seine (April 27, 1933) *Clunet* 1934, 900, *Revue Crit.* 1935, 759 requires identity of grounds in both laws, while LEREBOURS-PIGEONNIÈRE 394ff. no. 336 suggests that equivalence should suffice.

The Netherlands: Cf. VAN DER FLIER, *Grotius* 1937, 155.

constituting grounds for divorce under American statutes,²⁰³ and even covers adultery as a foreign requisite.²⁰⁴

The result of this system is, of course, that divorce is denied, if the personal law includes no ground to support the action. Englishmen (except where *renvoi* was applied) were refused divorce in most cases because of the narrow limits of the right to divorce in the English matrimonial law before the reforms.²⁰⁵ The same is still true of citizens of New York, domiciled in New York.²⁰⁶ But the internal conceptions of what are sufficient grounds for divorce also play a large role, although a certain elasticity in their application rests in the discretion of the court.²⁰⁷

A more definite position is taken by the German Code, the Hague Convention, and the codifications following them.²⁰⁸ Divorce must be supported in this system by the *lex fori* as well as by the national law.

This group, however, divides on the following point. In some of the texts involved, it has been made clear that, al-

²⁰³ E.g., Trib. civ. Seine (April 6, 1922) Clunet 1922, 674 (equation with gross insults under California law); Trib. civ. Seine (Jan. 19, 1926) Clunet 1926, 663 (equation with desertion under the Indiana statute).

²⁰⁴ POULLET, no. 379; NIBOYET 746. Adultery may be defined very differently (cf. SATTER, 5 Giur. Comp. DIP. 11), but the differences are not considered material.

²⁰⁵ Cour Paris (March 1, 1933) Gaz.Pal.1933.1.884; App. d'Aix (March 23, 1936) Rec. Somm. 1936, no. 1736; Cass. (req.) (April 20, 1937) Gaz. Trib. 1937.1.87: "injures graves" no cause for divorce under English law. Switzerland: BG. (Feb. 21, 1935) 58 Sem. Jud. (1936) 209, 11 Z.ausl.PR. (1937) 656 no. 2 (facts insufficient to constitute "injures graves" under French law, C. C. art. 231).

²⁰⁶ Trib. civ. Havre (Nov. 17, 1923) Clunet 1924, 1000.

²⁰⁷ A Dutch observer, KOLLEWIJN, Het beginsel der openbare orde 90, thinks Belgian courts are more inclined than French judges to recognize foreign divorce grounds unknown to the *lex fori*; the most authoritative writer on Belgian conflicts law, POULLET, no. 379 makes no such distinction, but he seems to favor a liberal interpretation of the similar ground theory.

²⁰⁸ Hague Convention on Divorce, art. 2.

Germany: EG. art. 17 par. 4.

Sweden: Law of July 8, 1904, with subsequent amendments, c. 3, § 2.

Switzerland: NAG. art. 7h par. 1.

Japan: Law of 1898, art. 16.

China: Law of 1918, art. 11.

though divorce must be justified by some ground under each of the two laws, the ground need not be the same in both.²⁰⁹ Hence, the Swiss Federal Tribunal declared it sufficient if the facts of a case supported, at the same time, disruption of the marriage according to Swiss law and *injures graves* within the French meaning²¹⁰ or disruption in the Swiss sense and violation of the marital duties under the then unmodified German Code.²¹¹ And if the national law of Polish Jews allowed divorce by mutual agreement, German courts granted it, provided that, in addition to satisfying the *lex fori*, a valid reason, such as adultery or fault in disrupting the marriage existed.²¹² The case of mutual agreement of Soviet Russian nationals has been treated in the same way.²¹³ The statutes of Japan and China²¹⁴ by their wording seem to exclude such interpretation and hence to require in fact that the same or a similar ground exist in both laws.

Cumulative application of two laws of any sort results in dismissal of a divorce suit when, according to only one of the two legislations, such events as condonation, recrimination

²⁰⁹ Hague Convention on Divorce, German and Swedish statutes (see *supra* n. 208). The Swiss statute is interpreted the same way. Cf. German RG. (April 5, 1921) 102 RGZ. 82; OLG. Hamburg (Oct. 21, 1914) Hans. GZ. 1915, BBl. no. 45; OLG. Hamburg (Jan. 5, 1915) *ibid.* no. 46; OLG. Rostock (Dec. 16, 1921) 77 Seuff. Arch. 174; OLG. Frankfurt (July 11, 1929) JW. 1929, 3507; OLG. Köln (Jan. 20, 1932) JW. 1932, 2304. The Netherlands: Rb. Haarlem (Oct. 29, 1935) W. 1936, no. 756 (under the Hague Convention).

²¹⁰ Swiss BG. (May 26, 1932) 58 BGE. II 183, 188.

²¹¹ Swiss BG. (June 13, 1912) 38 BGE. II 43, Erw. 3, 4.

²¹² OLG. Frankfurt (July 11, 1929) JW. 1929, 3507 (*supra* n. 209) and constant practice, despite some controversy in the literature whether divorce by agreement is opposed to German public policy and, if so, whether it may be taken as a basis for a German divorce decree; the dominant opinion interprets EG. art. 17 par. 4, which is less well drafted than art. 2 of the Hague Convention on Divorce, as satisfying all the exigencies of German public policy, irrespective of logical relation to par. 1 of art. 17. Cf. PRETZEL in JW. 1928, 3030; LUTTERLOH, JW. 1929, 419; HOLLÄNDER, JW. 1929, 1863.

²¹³ KG. (Sept. 14, 1936) JW. 1936, 3579; cf. RG. (April 4, 1928) 121 RGZ. 24.

²¹⁴ China and Japan, *supra* n. 208.

(compensation of causes),²¹⁵ or lapse of time negates the right to divorce.

Moreover, the double requirement opens a strange gap when divorce cannot be granted according to the national law, because the forum would grant another type of relief. Laws that leave the right to divorce without any limitation, like the Soviet Russian law, or which broaden the right, like the Belgian law, may eliminate or closely limit, respectively, the right to sue for annulment of the marriage. For instance, a marriage may be annulled under German law, because the husband was ignorant of an incurable serious illness of the wife at the time of the marriage, but it would not be voidable under Russian or Belgian law, as divorce takes the place of annulment there. Couples of these nationalities married in their respective countries and coming to live in Germany would not obtain either relief at their new domicil.²¹⁶

Permissive policy. Divorce laws are sometimes quaint, even if they do not equal the Chinese rules before 1931, under which the husband could divorce his wife because of her garb and the wife had no right of divorce. The tribunal of Brussels, in fact, reacted against the latter provision²¹⁷ and recently also reacted against barring divorce to Catholics of the former Polish kingdom,²¹⁸ as well as against the religious distinctions of the law of Iran.²¹⁹ The basis for its opposition is that it is contrary to the Belgian public order to investigate

²¹⁵ Cour Paris (July 7, 1920) Clunet 1921, 518 states that evidence is lacking for compensation of grounds according to the American law; cf. BARTIN, 2 Principes 305 § 314.

²¹⁶ Annulment was denied where the national law of the party who was in error does not regard the mistake as an impediment by RG. (Oct. 6, 1927) Warn. Rspr. 1928, no. 13, IPRspr. 1926-1927, no. 68, Revue 1930, 129; the prevailing opinion is in accord. See however, RAAPE, 2 D. IPR. 179 and *infra* p. 542.

²¹⁷ Trib. civ. Bruxelles (Jan. 3, 1923) 9 Bull. Inst. Belge (1923) 146. See also App. Liège (Nov. 2, 1937) J.d. Tr. 1937, col. 672 no. 3512, *supra* n. 182.

²¹⁸ Trib. civ. Bruxelles (June 22, 1938) J.d.Tr. 1938, col. 646 no. 3550.

²¹⁹ Trib. civ. Bruxelles (March 30, 1938) 53 J.d.Tr. 1938, col. 329 no. 3534.

the religious denomination of the parties. In all these cases, Belgian divorce law was substituted.

But German courts have not considered the wife's definitely inferior position in suing for divorce under the legislation of Austria and Italy as contrary to public policy.²²⁰ Nor has the former English law, allowing only the husband to sue on the ground of adultery, ever been repudiated on the Continent. More doubt has been expressed about the Jewish laws prohibiting the wife from suing even on the ground of adultery or attempt on her life, but they have been applied; the wife of a Mohammedan Persian was similarly treated.²²¹ Again, the court of Brussels once granted divorce in such a case.²²² According to the prevailing opinion, it is considered undesirable to increase the number of unfortunate cases where marriage exists with geographically limited force.²²³ So even bizarre foreign institutions are admitted.

4. Different National Laws

National law of the husband. Upon the same historical basis of coverture as in England, the national law of the husband alone is applicable, without regard to that of the wife, in Germany, Portugal, China, and Japan;²²⁴ according to part of the French doctrine, the national law of the husband is said to govern the causes for divorce.²²⁵ Independently of the historical background, this system has been appraised as

²²⁰ OLG. Düsseldorf (July 6, 1911) 110 Rhein. Archiv 158; OLG. Kiel (Feb. 28, 1923) 78 Seuff. Arch. 267, Clunet 1925, 1053.

²²¹ Germany: RG. (May 26, 1930) 43 Z.int.R (1930-31) 391; RG. (Sept. 29, 1930) JW. 1931, 148; LG. Nürnberg (Jan. 22, 1932) IPRspr. 1932, no. 81; KG. (May 11, 1931) IPRspr. 1931, no. 142.

France: Cass. (civ.) (Oct. 30, 1905) Clunet 1906, 410.

²²² App. Bruxelles (June 8, 1899) Clunet 1899, 859.

²²³ RAAPE 435.

²²⁴ German EG. art. 17 par. 1; followed by Japan: Law of 1898, art. 16 and China: Law of 1918, art. 11. This is also the rule adopted in the Treaty of Montreux, Egyptian Mixed Tribunals, Regulations of Judicial Organisation, art. 29 par. 3, publ. in U. S. Treaty Series, No. 939.

²²⁵ BARTIN, 2 Principes 323 § 318 states that this rule in the French system is not doubtful, but the decisions are not homogeneous; cf. *infra* pp. 441ff.

the simplest and most convenient in practice.²²⁶ In the last decades, however, such preference for the husband has found less and less favor, in conformity with the increasing tendency to allow a married woman to retain or resume her original citizenship.²²⁷

Last common nationality. In the Hague Convention on Divorce, the law of the last common nationality of both parties was adopted.²²⁸ The Sixth Conference added in its non-ratified drafts that where the parties never had a common nationality or where they changed from one common to two different new nationalities, divorce and separation depend on both laws cumulatively. The recent Greek Code more conveniently calls in such cases for the application of the national law of the husband as of the time of the marriage celebration.²²⁹

Both laws cumulatively. According to another theory, the granting of divorce must be permitted by the laws of both spouses.²³⁰

The law of the plaintiff. In contrast, the French courts usually pronounce divorce at the instance of a party whose

²²⁶ ROLIN, 2 Principes no. 591.

²²⁷ There is no advocate in France any longer, J. DONNEDIEU DE VABRES 474 n. 2 asserts, in ignoring Martin's recent book *supra* n. 225.

²²⁸ Hague Convention on Divorce, arts. 1, 2, 8; followed by Poland: Law on international private law, art. 17 par. 1; Rumanian Preliminary Draft of C. C. art. XXIV.

²²⁹ Greek C. C. (1940) art. 16.

²³⁰ Finland: Law of Dec. 5, 1929, art. 10.

Belgium: App. Liège (July 7, 1938) Pasicrisie 1938.2.129 (particularly exacting, as the wife had resumed Belgian citizenship); Rb. Antwerp (May 11, 1939) 8 Rechtsk. Wkbl. 1938-1939, 1552 no. 312.

Italy: UDINA, Elementi no. 136; SALVIOLI, 19 Rivista (1927) 354 (admits difficulties); and some decisions in France. Only Trib. civ. Seine (April 27, 1933) Revue Crit. 1935, 759 states that the grounds for divorce must agree with the foreign laws of both parties as well as with the French law. NIBOYET, Note *ibid.* 762 declares regard for the defendant's law unnecessary.

Portugal: Sup. Trib. de Just. (Jan. 5, 1918) 50 Direito 250, cited by CUNHA GONÇALVES, 1 Direito Civil 693.

Switzerland: BG. (June 23, 1933) 59 BGE. II 113; App. Zürich (June 23, 1934) 34 Bl. f. Zürich. Rspr. (1935) 72 no. 27; and App. Zürich (June 12, 1937) 37 Bl. f. Zürich. Rspr. (1938) 304 no. 151.

national law as such permits it. Although occasionally under this system foreign law has been applied,²³¹ the usual result is a resort to French law.

This conforms to a general trend. Suppose that the applicable conflicts rule calls for the municipal law of the husband, he a foreigner and the wife a national; or suppose that the last common nationality law should be applied, the wife alone having acquired the nationality of the forum during marriage,—courts are tempted to abandon the conflicts rule for the sake of the wife. The same development that has fostered favor for the wife's separate nationality induces the courts to permit the wife such rights of divorce as the law of the forum, which is also her national law, permits. Hence, early examples of exceptions made for nationals in some European and particularly in Latin American jurisdictions, have been multiplied in recent times.

From about 1906, French courts have granted divorce according to French law to the French wife of a mixed marriage.²³² If the husband were of Italian nationality, however, they were bound by article 8 of the Hague Convention on Divorce to observe the last common national law of the parties. But precisely for this reason, France renounced her participation in the Convention in 1913, and in 1927 a French woman marrying a foreigner was allowed to retain her French nationality. These two events reinforced the trend of the French tribunals. In the outstanding case of the *Marquis de Ferrari*, a French woman who, by marrying an Italian, had become an Italian national and had been judicially separated from her husband in Italy, recovered French citizenship. She was granted a divorce *a vinculo* in spite of the prohibition of Italian law which had controlled her marriage and was still the law of the Marquis. The basis was surprisingly simple:

²³¹ Cour Paris (March 1, 1933) Gaz. Pal. 1933. 1. 884, Revue 1933, 629 (English law applied against English husband in favor of his French wife).

²³² Trib. civ. Seine (Oct. 26, 1906) Revue 1907, 590; Cour Paris (Oct. 31, 1910) Revue 1911, 82; etc.

the Court of Cassation declared that French law is an indispensable attribute of French nationality.²³³ This decision attracted world-wide attention; its exact scope remains obscure, except where the application of the French law is in issue.²³⁴ Much criticism has been aroused by the inconsistency with which the foreign prohibition has been discarded in cases analogous to those in which, before dissolution of marriage was allowed in 1884, the French courts refused to recognize foreign divorces of a French national married to an alien, and the further inconsistency with the theory of fraud, which the French courts were fostering at the very time of the *Ferrari* suit.²³⁵ Nevertheless, the precedent of the *Ferrari* case has been followed.

In addition to France, Belgium, Switzerland, Germany, and Sweden successively left the Hague Convention to avoid the divorce prohibition of the member state, Italy; in all these countries, migratory Italian workers had married and deserted native women. Except for the little influence the Convention has preserved, it has become a habit in most of the European countries to allow divorce to a national party of a mixed marriage according to the *lex fori*.²³⁶ In Germany,

²³³ *Affaire Ferrari* no. 1, Cass. (civ.) (July 6, 1922) D.1922.1.137, S.1923.1.5, Clunet 1922, 714, Revue 1922-1923, 444; no. 2, Cass. (civ.) (March 14, 1928) S.1929.1.92, Clunet 1928, 383.

²³⁴ BARTIN, 2 Principes 308 concludes that these are purely French solutions, of mere French interest, which we have no reason whatsoever to apply to foreign couples; he does not even want to suggest recognition of an analogous decree of a foreign—say, a Brazilian—tribunal.

²³⁵ See PILLET, Revue 1922-1923, 464 frankly regretting the decisions as a break with international private law; AUDINET, 11 Recueil 1926 I 230; DE-GAND, 5 Répert. 555 no. 83; SALVIOLI, "Conflitto di leggi personali in materia di divorzio," Rivista 1927, 354. NIBOYER, Note S. 1929.1.9. As to the theory of fraud, J. DONNEDIEU DE VABRES 480 has answered that fraud is relevant only if committed against the law of the forum.

²³⁶ Brazil: (Before the law of 1942) Sup. Trib. Fed. (Nov. 6, 1918) Recurso Extraordinario no. 587, 20 Revista Sup. Trib. (1919) 246; Ap. civ. Rio de Janeiro (Jan. 16, 1942) no. 800, 62 Arch. Jud. 58. Cf. Ap. civ. Rio de Janeiro (Oct. 25, 1934) no. 4.332, 121 Revista Dir. Civ. (1936) 322 (the constitutional provision that Brazilian law is to be applied to the dissolution of a marriage even if only one of the spouses is of Brazilian nationality applies also in cases of judicial separation if nationality is acquired by naturalization).

France: Cass. (civ.) (May 7, 1928) S. 1929.1.9, Revue 1928, 653 (conversion of separation into divorce after naturalization); Cass. (civ.) (Feb. 5,

the enacted law was adjusted to this end.²³⁷

In Belgium, however, the courts have been thus far in disagreement. Their decisions are significant. In a series of cases, divorce was denied to a woman who had married an Italian and later recovered Belgian nationality, and to wives of Austrian origin and Catholic faith who had acquired Belgian nationality, on the unmodified rule that divorce must agree with the national laws of both spouses and on the consideration that at the time of the marriage both parties knew that their bond would be indissoluble.²³⁸ It has been argued, furthermore, that, logically, to free the party who belongs to the forum by application of his or her national law, would leave

1929) Clunet 1929, 1258; Cass. (req.) (Feb. 4, 1931) Clunet 1932, 451; Cour Colmar (Feb. 13, 1937) Nouv. Revue 1937, 240; Cour Paris (Dec. 21, 1937) Revue Crit. 1938, 251, and decisions of lower courts; cf. PERROUD, Clunet 1926, 24 n. 19; J. DONNEDIEU DE VABRES 475; Note, Trib. civ. Seine (Jan. 19, 1926) Clunet 1926, 663 (through renvoi, applying French law as the personal law of an American woman domiciled in France); Trib. civ. Seine (Dec. 20, 1937) Nouv. Revue 1938, 324 (granted divorce to the wife who had resumed French nationality, while under the husband's Dutch law adultery would have been required); Cour Colmar (Jan. 7, 1938) Clunet 1938, 797, Nouv. Revue 1938, 326 (French wife granted divorce without regard to the German law of the husband).

Rumania: Cass. (Sept. 13, 1876); Trib. Ilfov (April 8, 1935) Clunet 1937, 625. The contrary rule obtains because of the Hague Convention in the case of an Italian wife naturalized in Rumania: Cass. Bucarest (Oct. 25, 1928) Revue 1930, 517.

Spain: (during republican times) Trib. Supr. (July 10, 1934) 214 Sent. 642, Clunet 1936, 210 (Spanish wife, Italian husband).

Switzerland: BG. (June 5, 1901) 27 BGE. I 180 proclaimed that a Swiss spouse could apply for divorce notwithstanding the prohibition of divorce by the national law of the other spouse; BG. (June 13, 1907) 33 BGE. I 355 (one spouse a naturalized Swiss former Austrian Catholic); BG. (July 9, 1914) 40 BGE. I 418, 428; BG. (March 2, 1922) Clunet 1922, 752 (one party a naturalized Swiss, former Orthodox Russian); BG. (May 3, 1932) 58 BGE. II 93, Clunet 1932, 1151, Revue 1932, 710 (Swiss nationality resumed by wife of an Italian after Switzerland had left the Hague Convention).

²³⁷ German Law on Divorce of Jan. 24, 1935, RGBl. 1935, I 48.

²³⁸ App. Bruxelles (July 9, 1932) Revue Crit. 1933, 511 (sees the ideas of the Hague Convention transferred to the Belgian common law); App. Gand (July 11, 1935) 3 Giur. Comp. DIP. 302 no. 136; App. Liège (July 7, 1938) Pasirisie 1938.2.129, Belg. Jud. 1939, 303 (the more severe of the two national laws must be applied); App. Liège (Jan. 12, 1939) Belg. Jud. 1939, 401 (the wife "submitted" to the indissolubility of the union).

the other party married.²³⁹ As a matter of fact, this is the Swiss practice and the prevailing opinion in Germany,²⁴⁰ so far as remarriage is concerned. The Belgian authorities²⁴¹ to the contrary, who admit divorce, have replied that if the non-Belgian spouse remains married under his or her national law (not by Belgian law), it should be realized that this undesirable result is due to the fact that the unity of the law governing the marriage has been broken by allowing the wife a separate nationality.²⁴² This consequence is not strong enough "to prevail over the absolute and unconditional right that the wife derives from her national status and entitles her to break up a union the continuation of which might damage her." A Belgian writer has added that attitudes of high indifference to the misery of others are repugnant to the basic tendency of public life in Belgium.²⁴³

The analogy to the granting of divorce by the courts of the domicile of one party in the United States is the more striking, as in these Continental cases the plaintiff is generally domiciled at the forum. Niboyet suggests, however, that a wife should not be allowed to sue for divorce under her separate national law, unless the matrimonial domicile was established in France by both parties at the marriage or later.²⁴⁴ This means a step toward the exclusive dominance of the domiciliary jurisdiction, desirable in all respects.

²³⁹ Thus, LABBÉ, Note in S.1878.I.195. Cf. also DEGAND, 5 Répert. 553 no. 76, with earlier French decisions rejecting divorce; Trib. civ. Mons (April 8, 1927) Belg. Jud. 1927, 508 (applying exclusively the foreign husband's law "to avoid inextricable complications and eminently wrong situations").

²⁴⁰ See *infra* p. 518.

²⁴¹ Trib. civ. Bruxelles (June 27, 1928) Belg. Jud. 1928, 635 (despite the "bizarre and absurd" consequence that one party is not allowed to remarry); Trib. civ. Mons (May 8, 1930) and Trib. Bruxelles (May 20, 1931) J.d.Tr. 1931, cols. 462, 673 cited by JOFÉ, 22 Bull. Inst. Belg. (1936) 132; App. Liège (Feb. 2, 1931) Clunet 1932, 489.

²⁴² Trib. Arlon (April 23, 1937) Pand. Pér. 1938, 31 no. 8.

²⁴³ JOFÉ, 22 Bull. Inst. Belg. (1936) 133.

²⁴⁴ NIBOYET 749 no. 641.

VI. RENVOI

The problem of renvoi is presented when, according to the principle of nationality, the divorce law of the state to which a party belongs should be applied, while, according to the conflicts rule of the foreign state, this law is not to be applied. The Hague Convention on Divorce²⁴⁵ denied renvoi between member states, all of which followed the nationality principle, but renvoi is observed, as usual, in most countries following the principle, particularly by the French,²⁴⁶ German,²⁴⁷ and Swiss²⁴⁸ courts.²⁴⁹ The situation in German and Swiss divorce

²⁴⁵ See RG. (Nov. 8, 1922) 105 RGZ. 340; KG. (Nov. 27, 1933) IPRspr. 1934, no. 116 and KG. (April 9, 1934) IPRspr. 1934, no. 47.

²⁴⁶ France: Trib. civ. Seine (Jan. 19, 1926) Clunet 1926, 663 (American wife); Trib. civ. Fontainebleau (June 24, 1932) Clunet 1933, 666; Cour Paris (Dec. 24, 1935) Nouv. Revue 1936, 108; Cour Paris (July 24, 1937) Nouv. Revue 1937, 772 (two English parties; the English law even declares itself incompetent); and finally Cass. (req.) (May 10, 1939) Gaz.Pal.1939.1.962, Nouv. Revue 1939, 153, Revue Crit. 1939, 472 with a note by NIBOYET declaring that now he renounces his opposition to renvoi, although he construes it merely as a theory of national interest in cases not regulated by the national law. Among the four decisions against renvoi listed by J. DONNEDIEU DE VABRES 472 n. 3, and now overruled, the fourth, Cour Paris (March 1, 1933) Gaz.Pal.1933.1.884, Revue 1933, 629, Clunet 1935, 99, decided against the English husband, plaintiff, in favor of the French wife, defendant; the third, mentioned by KUHN, Comp. Com. 172 n. 66, Trib. Basses-Pyrénées (May 28, 1930) Clunet 1931, 1092, was a curious mistake.

²⁴⁷ Germany: as to American citizens: RG. (March 21, 1904) 48 Gruchot's Beiträge (1904) 801; OLG. Frankfurt (June 20, 1910) cited by LEWALD 110 no. 156; LG. München (July 1, 1921) JW. 1921, 1471; LG. Berlin (April 24, 1928) JW. 1928, 3128; OLG. Stuttgart (Dec. 4, 1930) JW. 1932, 601; RG. (Nov. 21, 1929) JW. 1930, 1309. As to British subjects: KG. (Sept. 20, 1901) 3 ROLG. 365; OLG. Darmstadt (May 18, 1906) DJZ. 1907, 1327; RG. (Jan. 7, 1907) JW. 1907, 127; OLG. Hamburg (Nov. 6, 1912) Hans. GZ. 1913, Beibl. 84 no. 52; OLG. Hamburg (March 31, 1927) Hans. GZ. 1927, Beibl. 139 no. 99; KG. (March 30, 1936) JW. 1936, 3572; OLG. Hamburg (April 22, 1937) Hans. RGZ. 1937, B 222 no. 101; LG. Berlin (May 21, 1938) JW. 1938, 1916. Argentine nationals: (where marriage is celebrated outside of Argentina) OLG. Hamburg (Feb. 2, 1929) and (May 16, 1930) IPRspr. 1930, nos. 75, 76; KG. (Feb. 28, 1938) JW. 1938, 2748. Danish nationals: dictum in RG. (April 6, 1936) 151 RGZ. 103, 106, correcting RG. (Feb. 24, 1928) Warn. Rspr. 1928, no. 64.

Iceland: RG. (April 6, 1936) 151 RGZ. 103.

Norway: OLG. Celle (Oct. 15, 1925) JW. 1926, 388.

Nicaragua: KG. (March 30, 1931) IPRspr. 1931, no. 70.

²⁴⁸ Switzerland BG. (June 15, 1928) 54 BGE. II 225, 231; cf. SCHNITZER 174.

²⁴⁹ Belgian courts have refused to accept renvoi by English conflicts law because the laws of both parties must agree with the law of the forum in permitting

courts, however, is further complicated by the provisions forbidding them, as we have seen above,²⁵⁰ to assume jurisdiction unless recognition of their jurisdiction appears fairly certain in the national country of the parties. Generally, it seems, these courts have not been aware of all the intrinsic difficulties in this matter; however, most of their decisions can probably be justified. We must here distinguish the questions of choice of law and of jurisdiction.

The problem of the law of conflicts is rather simpler in this case than in status questions generally.²⁵¹ It is quite easily settled, if we understand the position of English, American, Danish, and Norwegian lawyers in the sense that they recognize the jurisdiction of the domicile under certain conditions and that, as they themselves apply the law of the forum at home, they are not interested in what substantive private law would be applied by a foreign divorce court.²⁵² Hence, a French or German divorce court is permitted (though not directed, as was so often believed in Europe) by the national law of a British subject to apply the law of the forum. It does not matter that by another mistake²⁵³ European courts have often referred to the common law country where a British or American national was last domiciled instead of to the general principles of British or American law. Recently, German courts have realized that they are applying German law as the *lex fori*²⁵⁴ (and not *qua lex domicilii*) with the blessing of that national law. This was a new realization, as observers in Germany had thought that there never is a *renvoi* referring to

divorce. See Rb. Antwerp (May 11, 1939) 8 Rechtsk. Wkbl. 1938-1939, col. 1552 no. 312.

²⁵⁰ *Supra* pp. 411-413.

²⁵¹ *Cf. supra* n. 146.

²⁵² This seems to agree with KUHN, *Comp. Com.* 171; it is true that KUHN concludes just contrary to the text that *renvoi* is particularly unsound with respect to common law countries.

²⁵³ For instance, OLG. Stuttgart (Dec. 4, 1930) JW. 1932, 601, and BERGMANN in the note *ibid.* assume a *renvoi* from the California law because the party had formerly been domiciled in California. See *supra* p. 134.

²⁵⁴ See e.g., KG. (March 30, 1936) JW. 1936, 3570 *in fine*.

the law of the forum.²⁵⁵ With national laws such as that of Argentina, the situation is theoretically different; the law governing at the domicile of the husband is applicable.²⁵⁶

The entire problem, otherwise almost desperate, is reduced in this manner to the question of determining in which cases a Continental court may assume jurisdiction for divorce with the expectation that the decree will be recognized in the national country. As a matter of fact, the answer must be different with respect to the individual jurisdictions where recognition is sought.

It is easy to answer the question when the husband is a national of a country such as England or Argentina, where the domicile of the husband is the matrimonial domicile and the law of this domicile governs the right to divorce (possibly also after one party has deserted the matrimonial domicile). German courts have scrupulously investigated whether a British husband was domiciled within their territory, making certain that domicile at the forum exists not only in the German sense but also in the British sense.²⁵⁷

If one or both of the parties are of American nationality, the solution is simple where both have their effective domicile, common or separate, in the country of divorce. But if not, which of the approximately fifty individual American territorial laws should be considered? It is incorrect to assume that the last domicile within the United States, now abandoned, should control, and the Continental court would scarcely be justified in speculating before which court in the United States the matter could probably be brought on the grounds of the situs of property, the residence of children, etc.

²⁵⁵ MELCHIOR 215 § 143.

²⁵⁶ This was overlooked by LEWALD, 29 *Recueil* 1929 IV 565, who uses the Argentine law as an argument against *renvoi*.

²⁵⁷ See the detailed instructions about what a German court ought to ascertain concerning the American requirements for recognition of divorce decrees in RG. (Nov. 21, 1929) JW. 1930, 1309, and the careful statements as to the domicile under English law in KG. (March 30, 1936) JW. 1936, 3570.

The requirements of full faith and credit to divorce decrees under the Constitution as developed by the Supreme Court of the United States would not be directly decisive, since they do not include foreign nations. Recognition seems to be granted in virtually all American jurisdictions to alien decrees of divorce, however, if no party is domiciled within the forum to which such a decree is presented for recognition and one party was domiciled at the divorce forum, while the other was personally served with process or appeared and litigated on the merits. Hence, it would be safe to assume jurisdiction in such a case in Germany, Switzerland, Sweden, Hungary *et cetera*. Although not certain, it is probable that these conditions have been fulfilled in most, if not all, cases of admitted renvoi. And there is no necessity of allowing more divorces to foreigners.

VII. CHANGE OF DOMICIL OR NATIONALITY

Conditions on which the granting of divorce depends may change in different respects, viz., (1) domicile or nationality as the foundation of the court's jurisdiction may be altered while the lawsuit is pending; (2) domicile or nationality as determining the applicable law may be modified during the proceedings; and (3) the status may have been changed after the occurrence of the circumstances on which the divorce action is based.

I. Change of Factor Determining Jurisdiction

As the three questions just mentioned have sometimes been confused, it has not always been clear that the first is dependent simply on the definition and the effects which the rules of civil procedure give to the commencement of an action for divorce. Generally, so soon as the action is considered instituted according to the conception of the forum, the jurisdiction established at this moment remains fixed for the dura-

tion of the suit—*forum perpetuatur*—jurisdiction continues.²⁵⁸ That, conversely, the ground for jurisdiction can be supplemented later, is not universally affirmed.

2. Change of Factor Determining the Choice of Law After Beginning of Litigation

The second question may be illustrated by three German cases, which result in the following paradigm. An American citizen, at the time domiciled in Germany but formerly of California, instituted a divorce suit in the German court of his domicile but afterwards during the proceedings moved to Copenhagen, Denmark. There was no doubt that by American principles (or, as it was construed, by the law of California) German family law was to be applied by way of *renvoi*, so long as the domicile of the husband was in Germany. But did American law, after the change of domicile, refer to German or to Danish law, and was this reference still decisive for the German court? The Court of Appeals of Stuttgart thought the question solved by the principle of perpetuation of the forum mentioned above.²⁵⁹ But, although this reasoning may seem consonant with the conception, prevalent in this country, that the *lex fori* governs divorce, in Germany the matter is undoubtedly part of the choice of law problem and cannot be answered by procedural rules. The Reichsgericht, in another case also, in inquiring whether reference should be made to the new domicile, refused to consult the national law but based its solution on the deliberate wording of the German conflicts rule,²⁶⁰ invoking the law of the state to which the husband belonged at the time of the commencement of the ac-

²⁵⁸ See, for instance, Restatement § 76; German C. of Civ. Prov. § 263 par. 2.

²⁵⁹ OLG. Stuttgart (Dec. 4, 1930) JW. 1932, 601. *Contra*: RG. (April 6, 1936) 151 RGZ. 103.

²⁶⁰ EG. art. 17 par. 1; RG. (March 19, 1936) 150 RGZ. 374; RG. (April 6, 1936) 151 RGZ. 103, 108 (husband of Icelandic nationality served with process in Germany returned to Iceland; in this case the Icelandic law, investigated as to its position on the question, revealed that it did not contain any rule concerning the effect of a change of domicile upon the law applicable).

tion. The same rule seems to prevail in France²⁶¹ and Belgium²⁶² as a matter of course. As the question is not identical with the procedural problem, the German courts permit the choice of law to be that of the time when the defendant is served in the action²⁶³ or when the ground for divorce is pleaded in court;²⁶⁴ a subsequent unilateral change of status by the husband is disregarded.²⁶⁵

The Polish statute (art. 17 par. 1) also declares applicable the law of the state to which the spouses belong at the time of the action; the Polish Supreme Court has understood this to mean, however, the country to which the parties belong when judgment is rendered.²⁶⁶ In fact, the danger of arbitrary changes made by one party is eliminated by this statute, since it refers to the law of the common domicil.

3. Changes of Factor Determining Choice of Law Before the Divorce Suit Is Brought

To understand the problem in question, suppose that the domicil of the husband is the test in two states, X and Y, and that adultery is the only ground for divorce in X (e.g., New York), while desertion is a sufficient ground in Y (e.g., New Jersey), and suppose that:

(i) The husband changes his domicil from X to Y, suing his wife in Y on the ground that she deserted him when he resided in X; or

(ii) The husband leaves his domicil in Y, suing his wife in X, alleging that she deserted him in Y.

²⁶¹ LEREBOURS-PIGEONNIÈRE 319ff. no. 280 and 393 no. 335.

²⁶² However, Trib. civ. Bruxelles (Dec. 6, 1939) J.d.Tr. 1940, 120 rejects the action for divorce of Spaniards, divorce having been prohibited by the government of Franco during the pendency of the trial.

²⁶³ RG. (April 6, 1936) 151 RGZ. 103, 108; cf. HABICHT 135; WALKER 685.

²⁶⁴ RG. (April 21, 1902) 46 Gruchot's Beiträge (1902) 959; RG. (April 6, 1936) 151 RGZ. 103; cf. KG. (Dec. 17, 1934) IPRspr. 1934, no. 58.

²⁶⁵ RG. (April 6, 1936) 151 RGZ. 103, 108; against RAAPE 378 and 3 FRANKENSTEIN 438.

²⁶⁶ Polish Sup. Ct. (Dec. 9, 1935) 4 Z.osteurop.R. (1938) 742.

Three solutions have been advanced:

(a) The court should consider the ground for divorce exclusively under the law ordinarily applicable, irrespective of whether the facts occurred before or after the acquisition of the new personal law.

Hence, desertion in X in case (i) is sufficient for divorce in Y; desertion in Y in case (ii) is insufficient in X.

(b) Conversely, the facts which happened when the personal law was not yet changed should be evaluated by the personal law of the party at that time.

Hence, desertion in X is no ground; desertion in Y is a sufficient ground for both courts in both cases (i) and (ii).

(c) Divorce should be granted only if the facts warrant divorce under both laws, the former personal law of the time when the facts occurred and the present personal law.

Hence, action is dismissed in both cases (i) and (ii).

The first view—(a)—is naturally taken by courts applying the *lex fori*. Under this theory, decisions were formerly rendered by the German courts, as by the great majority of American cases.²⁶⁷ It is also applied by the French courts in determining grounds for divorce according to the *lex fori* when the applicant is a French national; in the leading case, the *Ferrari* case, the Court of Cassation justified the granting of divorce under French law by events preceding the re-naturalization of the plaintiff wife by declaring that the action was to be based not so much on the material events as upon the harm done by them to the conjugal life.²⁶⁸ It is remarkable that this view was accepted by the Swiss Federal Tribunal in a case analogous to the *Ferrari* case, so that the court applied

²⁶⁷ Germany: RG. (June 19, 1883) 9 RGZ. 191, 193.

England, see WESTLAKE § 52.

United States: MINOR § 84; 1 BEALE § 110.5.

²⁶⁸ Cass. (civ.) (March 14, 1928) Clunet 1928, 383; see particularly App. Limoges (Feb. 26, 1929) and App. Nîmes (April 15, 1929) Clunet 1930, 368. *Contra*: AUDINET, Note to Cass. (civ.) (Feb. 5, 1929) S.1930.1.81ff., criticizing the retroactive effect given to a naturalization; but see LEREBOURS-PIGEONNIÈRE 401 no. 339.

only Swiss law, although for this purpose a strictly contrary statutory provision had to be daringly interpreted as referring to foreign plaintiffs only.²⁶⁹ French courts, however, seem to extend the retroactive force of the *lex fori* to divorce actions of foreigners.²⁷⁰

The second view—(b)—agrees with a literal construction of the Japanese statute providing that divorce is governed by the national law of the husband at the time when the facts causing divorce occurred.²⁷¹ This method avoids in a radical way any attempt at evasion by the husband but is highly impractical.

The third opinion—(c)—goes far back and was strongly advocated by an editor of Story's work, Judge Redfield, claiming that:

"It would be an intolerable perversion that an act which by the law of the State where committed was no cause of divorce should, by the removal of the parties to another State where the law was different, become sufficient to produce a dissolution of the married relation."²⁷²

In this assertion, the words "State where committed" are evidently a mistake. That the state where the act was committed should be of any importance was sharply denied by Story.²⁷³ Redfield plainly meant the state where the party was formerly domiciled; an act or conduct should not warrant divorce, if insufficient in the state where the party was domiciled at the time when it occurred.²⁷⁴ The rule as formulated, however, was adopted by many statutes and even by the American Uniform Draft of 1900 and 1907, that of 1900 running as follows:

²⁶⁹ BG. (May 3, 1932) 58 BGE. II 93.

²⁷⁰ LAURENT, 3 Principes 537ff. no. 306, and many decisions, particularly, Cass. (civ.) (May 7, 1928) S.1929.1.9.

²⁷¹ Japan, Law of 1898, art. 16.

²⁷² REDFIELD in STORY (ed. 6) § 230c.

²⁷³ STORY § 230a.

²⁷⁴ REDFIELD in STORY (ed. 6) § 230c speaks of the transfer of the domicil. § 230d, however, sounds again perplexing.

"No divorce shall be granted for any cause arising prior to the residence of the complainant or the defendant in this state which was not a ground for divorce in the state where the cause arose."²⁷⁵

This confusion of the time when, and the place where, the offence occurred, makes the interpretation of the various American statutes difficult.

The sanction that Story himself would have had in mind was certainly the *refusal of jurisdiction*.²⁷⁶ Correspondingly, the actual statutes possess two kinds of clauses. On the one hand, jurisdiction for divorce is often denied, with or without statutory provision, when the cause of action occurred outside of the state and the spouses were domiciled at the time out of the state. On the other hand, in many statutes the required time of residence preliminary to the action is prolonged, if the cause took place outside of the state. Whatever the exact sense of these clauses may be, their tendency is to prevent or to render it difficult for a fact to be appreciated by a court under a law other than would be relevant if the party in question had stayed at his domicil. Apparently the draftsmen of the statutes have felt bound to the law of the forum, if once jurisdiction is assumed, and therefore have thought that the only remedy is to deny jurisdiction. A connected provision of the Uniform Act of 1906²⁷⁷ seems to follow this conception. The wording of the draft that had preceded in 1900,²⁷⁸ however, reproduced in the preceding paragraph, may possibly be understood as involving a choice of law, meaning that the divorce ground is governed by the law of the domicil

²⁷⁵ Draft printed in 14 Harv. L. Rev. (1901) 525, sec. 1. The explanation at 526 is rather confused.

²⁷⁶ See STORY's own quotation § 230a of Gibson, C. J., in *Dorsey v. Dorsey* (1838) 7 Watts (Pa.) 349; and see WHARTON § 231 on the later events in Pennsylvania.

²⁷⁷ National Conference of Commissioners on Uniform State Laws, *supra* n. 4, at §§ 8(b), 10(b) adopted in Del. Rev. Code (1935) §§ 3505(b), 3506(b); N. J. Rev. Stat. (1937) vol. 1 §§ 2.50-10(b), 2.50-11(b).

²⁷⁸ Draft of Uniform Divorce Law, *loc. cit. supra* n. 4, cf. Ky. Civil Code of Pract. (Carroll, 1938) § 423(2).

as of the time when the facts complained of happened. A consequence would be, that where the alleged cause fails to agree with such foreign law, the suit ought to be dismissed as to the merits, and not only *quoad instantiam*.

The same idea was to be found in Europe in the early nineteenth century and is now frequent.²⁷⁹ The German statute, after providing that (EG. art. 17, par. 1) divorce is governed by the law of the husband as of the time of the commencement of the action, prescribes that (*ibid.*, par. 2) a fact that has occurred while the husband belonged to another state cannot be claimed as a ground for divorce, unless the fact is ground for divorce or separation also according to the laws of that other state.

Correspondingly, the law of a former common nationality of the parties is to be consulted according to the Hague Convention and the Polish, Swedish, Swiss, and Hungarian statutes,²⁸⁰ and the law of the former domicil is influential in the Scandinavian countries²⁸¹ and under the *Código Bustamante*.²⁸²

A special problem arises, if permanent conditions, such as mental deficiency, venereal disease, or habits of drunkenness,

²⁷⁹ App. Liège (April 24, 1826) Pasicrisie 1826. 125, 127; for the practice of the Prussian courts, compare Gebhardsche Materialien 188.

²⁸⁰ Hague Convention on Divorce, art. 4.

Poland: Law of 1926 on international private law, art. 17 par. 2.

Sweden: Law of 1904 with subsequent amendments, c. 3 § 2 par. 2.

Switzerland: NAG. art. 7h par. 2; cf. BG. (May 3, 1932) 58 BGE. II 93; SCHNITZER 175.

Hungary: Marriage Law of 1894, § 115 par. 1.

Moreover, the treaties of Czechoslovakia with Yugoslavia (March 17, 1923, art. 34 par. 2), Poland (March 6, 1925, art. 7), and Rumania (May 7, 1925, art. 19 par. 2); cf. SVOBODA, 4 Leske-Loewenfeld I 313 n. 186.

In Republican Spain LASALA LLANAS 140 advocates the same principle.

²⁸¹ Denmark: prevailing opinion, see MUNCH-PETERSEN, 4 Leske-Loewenfeld I 747; BORUM and MEYER, 6 Répert. 221 no. 50; HOECK, Personalstatut 33.

Norway: see CHRISTIANSEN, 6 Répert. 575 no. 119.

Iceland: see EYJÓLFSSON, 4 Leske-Loewenfeld I 762.

²⁸² Art. 52; cf. art. 54 and BUSTAMANTE, La commission des jurisconsultes de Rio 121, no. 124.

Cf. Guatemala: former C. C. art. 209.

are recognized reasons for divorce under the new but not under the old statute; can desertion be said to begin only after the acquisition of the new status? The American cases are divided.²⁸³ Suppose a married couple was domiciled in New York, where insanity is not a cause for divorce, and later transferred their domicile to Norway, where it is, if continued through three years. Should a time of lunacy spent in New York be counted? This question ought to be affirmed, to avoid an unreasonable rule.²⁸⁴

The choice of law rule just contemplated, although systematically better justified than the refusal of jurisdiction, makes the task of the judge delicate. Under the European formulas, several legislations must be simultaneously applied; if the parties have changed from a foreign nationality to two other foreign ones, this makes three, and with the law of the forum, four. No judge will like so much complication. All these rules may be questioned. Some of them seem practically superfluous. The German provision was designed to prevent the husband, whose national law alone is decisive, from changing his nationality so as to force his new law on his wife, if the new law were more favorable for obtaining divorce.²⁸⁵ Similar are the purposes of enactments preserving the divorce law of a former domicile. But there is no sufficient reason to complicate things where the last common nationality or domicile of the parties is chosen to govern, just for the reason that it renders a change of status of one party harmless.

As a whole, the contrast of opinions concerns the basic theory. Where the law of the domicile dominates ideas, it is

²⁸³ 1 BEALE 473 § 110.5. The courts of New Jersey are consistent in requiring that the two year period for desertion must have run after the deserting party became a resident of the state; see *Berger v. Berger* (1918) 89 N. J. Eq. 430, 105 Atl. 496, and citations at 497. The other view was taken by two old decisions of New Hampshire, see 1 BEALE 474 n. 2; *Batchelder v. Batchelder* (1843) 14 N. H. 380; *Hopkins v. Hopkins* (1857) 35 N. H. 474.

²⁸⁴ *Contra*, RAAPE 388.

²⁸⁵ Conversely, it seems that the husband is able to avoid a threatened divorce by changing to a more rigid law; LETZGUS, 145 Arch. Civ. Prax. 299.

likely that this law will be regarded as determining the judicial value of the facts occurring during its reign. The European rules described above are derived in an analogous way from the personal national law. On the contrary, the majority view in this country is manifestly conceived within the sphere of territorialism.

While American courts, at least, are consistent in following the idea of a territorial law of the forum, some important European courts inaugurating a similar theory have rebelled against the current respect for the national law. We have mentioned above the leading case of *Ferrari*; the French Court of Cassation granted divorce to the wife who was Italian by marriage but had recovered French nationality. No new facts had arisen since the separation of the parties from bed and board, rendered before the wife's re-naturalization. If the French Court of Cassation granted the divorce upon the anterior facts because the action was based, not so much upon the material facts as upon the harm done by them to the conjugal life,²⁸⁶ the reasoning certainly is untenable; the different legislations determine precisely what kind of facts should be regarded as essentially disturbing the marital community.²⁸⁷ However, in view of the fact that one of the most reliable courts in the world, the Swiss Federal Tribunal, followed the French example all the way, in the face of the express contrary legal provision,²⁸⁸ we must conceive that the application of the foreign law appears unbearable to judges.

Hence, the European courts are coming back to where the English and the American courts have remained; the case where the plaintiff has changed to the domicile or nationality of the forum is the really important one. Of course, there is the evident danger of encouraging evasion of foreign laws,

²⁸⁶ See *supra* n. 268.

²⁸⁷ AUDINET, Note to Cass. (civ.) (Feb. 5, 1929) S.1930.1.81.83; but cf. LEREBOURS-PIGEONNIÈRE 401.

²⁸⁸ See *supra* n. 269.

and the French courts have been reproached on this ground, the more so since they had been extremely sensitive to foreign divorce "in fraud" of French law. English criticism of this system emphasizes that a husband can, by transferring his domicile to England, escape the indissolubility of marriage inherent in the law of his former domicile, and thus cause hardship to the wife and provoke legal difficulties, since the resulting decree, in all probability, will not be recognized in other countries involved.²⁸⁹ This case has not been covered by the Matrimonial Causes Act of 1937. That Act only helps the wife to maintain the English home, but even for this it is not clear whether the English jurisdiction is exclusive. The majority of the American statutes have tried to define the jurisdiction of the courts by those various additional requirements which we have mentioned before; these clauses are complicated and not really effective, except where the minimum residence is seriously upheld.

The case where both parties change their personal law in favor of that of the forum, has always been felt as less shocking than the circumvention of a divorce law by one of the spouses to the detriment of the other. Also the means of repression need not be necessarily the same. The German provision was intended to prevent the husband from arbitrarily changing his law, which was the governing law; but the Hague Convention avoided this peril by constituting the law of the last common national law as governing. Both cases, however, ought to be clearly envisaged in future discussions.

VIII. CONCLUSIONS

Three systems are outstanding. The first, the American method of applying the *lex fori* to divorce suits with foreign elements, has revealed itself as being unique. In the wide domains of the British commonwealth of nations, and under

²⁸⁹ CHESHIRE 361.

the Montevideo and the Scandinavian Treaties, the litigation takes place at the actual or, in certain cases, the last matrimonial domicile, so that the law of the forum is in harmony with the genuine domiciliary principle. The third main solution presented by the Continental European and the Chinese and Japanese legislations has been derived from the doctrine that the national law of the parties must be respected, although the domestic law has to be consulted at the same time. The courts, in these latter countries, are open to foreigners domiciled in the state and in many cases as well to nationals domiciled abroad. Nowhere, however, in these two systems do courts accept divorce suits at the domicile of the plaintiff alone and at the same time apply exclusively the local divorce statutes, even though the plaintiff is of foreign nationality. This is literally the rule in this country in the case of an alien petitioner. But the characteristic point of comparison is that where the plaintiff, an American citizen, has by his domicile therein become a citizen of the state, this state will assume jurisdiction and apply its own statute exclusively, irrespective of the past and present legal situation of the other spouse. We have seen that no learned doctrine is able to justify this principle. We have also alluded to some of the evils to which it leads. But we have begun our comparative study for the purpose of finding out whether the methods used abroad are preferable.

The answer is, flatly, no.

The system centered around the matrimonial domicile is of tempting simplicity and offers a splendid basis for international cooperation. However, the United States and the states of the nationality principle cannot be expected to restore the idyllic conditions permitting such unity of rules. Again, it has never been discussed whether it would not be feasible and advisable to have a court, sitting at the domicile of one party, apply the law of the last common domicile in-

stead of its own law, irrespective of the time when the cause occurred.

The system of cumulative application of laws is so complicated that the difficulties connected with it seem out of proportion to its usefulness. More fateful still, the precarious balance between the foreign and the domestic law achieved in the German Code and the Hague Convention has been finally destroyed by the judicial and legislative movement characterized by the *Ferrari* case. Such a fervent advocate of the nationality principle as Pillet immediately perceived how incompatible with this principle it is to apply the domestic law to a foreign husband. This system is in ruins. A radical clearing up will be inevitable sooner or later.

Thus, really, it cannot be contended that the methods used outside of this country are superior to the framework of the American law of this subject.

Reforms can consist of a very simple development. The requirement of a minimum residence time is today the chief vehicle for correcting the scope of divorce jurisdiction. Uniform drafts have acknowledged its importance and insisted that the minimum should be of one or two years. This requirement ought to be freed from the wild-grown tendrils with which it is surrounded, and it should be enforced with the utmost rigidity. This method demonstrated by a century's history as being suitable to exigencies of life in America, brings us nearer to the much spoken of "interest of the state" in the married status of its domiciliaries. In the twilight under which it is hard to distinguish a freshly acquired actual domicil from a fictitious one, that is, a non-domicil, a court that must predicate its jurisdiction upon the "interest of the state" so defined is in an unenviable position. In order to compete with another state in the task of adjudging any status of a person, the state should ascertain that the person belongs to the life of the state, regularly and definitively. Such competition can-

not be helped. But at least evasion among the states, and evasion by one spouse at the cost of the other, would be eliminated. With a two years' residence, or even a period of one year, strictly observed, any intention of obtaining divorce under the conditions is immaterial. Besides, very few individuals are able to change their local connections completely and to maintain their new center of private and business life during such a time merely to gain a divorce. Not every necessary improvement, of course, can be accomplished by such a measure alone; perhaps this is the reason why the uniform drafts have not appeared to attract sufficiently active support to accomplish a general reform. Where the parties are actually domiciled in two different states, the adequate method of dealing with the case is not to apply the statute of either state, but rather to apply that of the last common domicil. This suggestion should be appreciated by future European legislators. Whether it could be brought into the structure of the American statutory systems might be a matter of discussion.

More important, however, are reforms in the field of domestic divorce practice. They are prerequisites also of a better and sounder system of reciprocal recognition of foreign decrees.

CHAPTER 12

Recognition of Foreign Divorce¹

DIVERGENCES concerning recognition of foreign divorces are too great to allow any systematic comparison.² A few texts, representing the three systems described in the preceding chapter, illustrate the situation:

Restatement of the Law of Conflict of Laws, § 113. A state can exercise through its courts jurisdiction to dissolve the marriage of spouses of whom one is domiciled within the state and the other is domiciled outside the state, if

(a) the spouse who is not domiciled in the state (i) has consented that the other spouse acquire a separate home; or (ii) by his or her misconduct has ceased to have the right to object to the acquisition of such separate home; or (iii) is personally subject to the jurisdiction of the state which grants the divorce; or

(b) the state is the last state in which the spouses were domiciled together as man and wife.

Treaty of Montevideo on International Civil Law (1940), Article 15. The law of the matrimonial domicile governs: (a) conjugal separation; (b) dissolubility of marriage; but recognition of the dissolubility shall not be obligatory upon the state where the marriage was solemnized, if the ground invoked for dissolution was divorce and if the local laws do not admit of that ground as such. In no case shall the celebration of a subsequent marriage, in accordance with the laws of another state, constitute the crime of bigamy.

Article 59. Actions for annulment of marriage, divorce, or dissolution, and, in general, actions regarding all questions

¹ Comparative literature: LORENZEN, "The Enforcement of American Judgments Abroad," 29 *Yale L. J.* (1919) 188, 268; VREELAND, *Validity of Foreign Divorces* (1938); GUTTERIDGE, "Conflicts of Jurisdiction in Matrimonial Suits," 19 *Brit. Year Book Int. Law* (1938) 19; READ, *Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth* (1938).

² See VREELAND, *Validity of Foreign Divorces* 319ff.

which affect the relations of spouses, shall be instituted before the judges of the matrimonial domicile. . . .

German Code of Civil Procedure, § 328. Recognition of the judgment of a foreign court is excluded:

1. If the courts of the state to which the foreign court belongs are not competent, according to the German laws;

2. If the unsuccessful defendant is a German and has not defended the proceeding, provided that summons initiating the proceeding has been served on him neither personally within the state of the court of suit nor by means of German judicial assistance;

3. If the judgment, to the detriment of a German party, disagrees with the provisions of article 13, par. 1, 3 or articles 17, 18, 22 of the Introductory Law to the Civil Code, . . .

4. If recognition of the judgment would violate morals or the purpose of a German law;

5. If reciprocity is not guaranteed. . . .

I. INDIVIDUAL SYSTEMS³

1. England⁴

A foreign final decree of divorce is recognized by English courts, if (1) it is rendered by the court of any other country, which is competent according to its own *lex fori*,⁵ and (2) if (a) the husband was domiciled in the English sense in that country⁶ at the time of the commencement of the suit for divorce⁷ or (b) if the decree would be recognized by the court of the husband's domicile.⁸

³ With respect to countries not considered here, see:

For Switzerland, GAUTSCHI, "Die Anerkennung von ausländischen Ehescheidungsurteilen," SJZ. 1926, 1.

For Italy: SERENI, "Legal Problems of Divorce in Italy," 28 Iowa L. Rev. (1943) 286, 291.

⁴ FALCONBRIDGE, "Recognition of Foreign Divorces," [1932] 4 D. L. R. 39; FOSTER, "Some Defects in the English Rules of Conflict of Laws," 16 Brit. Year Book Int. Law (1935) 89; ELKIN, Clunet 1938, 98; CHESHIRE 361.

⁵ Bater v. Bater [1906] P. 209.

⁶ Harvey v. Farnie [1880] 5 P. D. 153, [1882-1883] 8 App. Cass. 43; Le Mesurier v. Le Mesurier [1895] 20 App. Cas. 517; Lankester v. Lankester [1925] P. 114; Simons v. Simons [1939] 1 K. B. 490 (Massachusetts decree).

⁷ Wilson v. Wilson (1872) [1869-1872] L. R. 2 P. & D. 435.

⁸ Armitage v. Att. Gen. [1906] P. 135 (divorce decree in South Dakota

Illustrations: (a) An English married couple went to live in Detroit, Michigan; the wife returned to England; by agreement with her, the husband brought action for divorce and obtained a decree by default in the Wayne County Court. The High Court of England presumed that both spouses were domiciled in Detroit, as the husband certainly was.⁹ Therefore, recognizing the Michigan divorce, the High Court dismissed an action of the wife for divorce.¹⁰

(b) A husband, resident in Michigan according to American conceptions but domiciled in Canada according to British law, obtained a divorce decree in Michigan. The decree was not recognized in Canada¹¹ and therefore not in England either.

English courts are known, however, by courtesy to recognize the finding of domicile by trustworthy foreign courts.¹²

The recent change of legislation (Matrimonial Causes Act of 1937) by which a deserted wife may institute suit at the last marital domicile would seem to bring about recognition of foreign jurisdiction under analogous circumstances;¹³ no authorities are yet known.

would be recognized in New York, where the husband was domiciled; hence recognized in England). *Cass v. Cass* (1910) 102 L. T. R. 397, *Clunet* 1910, 1259 (South Dakota decree not recognized in Massachusetts, where husband was domiciled; hence recognition denied in England).

⁹ *Crowe v. Crowe* (1937) 157 L. T. R. 557, [1937] 2 All E. R. 723, *Clunet* 1938, 97; similarly, *Leigh v. Leigh* [1937] 1 D. L. R. 773 (if nothing is proved, the court will presume that the foreign tribunal (again a Detroit court) had jurisdiction over the parties by reason of domicile and that the domicile was properly and validly established).

¹⁰ Cf. the reasoning of FALCONBRIDGE in [1932] 4 D. L. R. 41, *supra* n. 4, before the Amendment Act of 1937.

¹¹ *Rex v. Woods* (1903) 6 Ont. L. R. 41; similarly, *Green v. Green* [1893] P. 89 (Pennsylvania decree).

¹² Information obtained in a Swiss divorce case; see WYLER, SJZ. (1933-34) 199.

¹³ The contrary opinion is expressed by MAGDALENE SCHOCH in 5 *Giur. Comp. DIP.* 300.

Before the Act of 1937, recognition in England and throughout the British Dominions of a divorce rendered in New Zealand under the provision enabling a deserted wife to sue at the last matrimonial domicile was anticipated by Mr. Justice Denniston in *Poingdestre v. Poingdestre* (1909) 28 N. Z. L. R. 604, 11 G. L. R. 585, but doubted in the case of a Victoria decree by Chief Justice Irvine in *Chia v. Chia* [1921] V. L. R. 566. See READ, Recognition and Enforcement 229, who shared the doubts.

The English rule is so exclusively influenced by jurisdictional considerations that the reasons upon which a foreign court bases its decree are immaterial. The grounds of the foreign decree need not be in accord with the grounds for divorce established in English matrimonial law,¹⁴ provided, of course, the decree does not violate good morals.

2. The United States ¹⁵

While recognition of decrees of foreign countries attracts scant attention, recognition of divorces rendered in sister states is one of the most discussed subjects of American law. The formidable complications ensuing from conflicting social policies and constitutional controversies have not been met with consistent and purposive judicial methods, in part due to the limited federal control exercised over the subject matter by the Supreme Court under the Full Faith and Credit Clause. One school of thought, indeed, has seemed to prefer cautious case construction to any rules. However, in recent decades before *Williams v. North Carolina*¹⁶ revived the conflict of opinions, it was prevailingly assumed that the recognition due under the Full Faith and Credit Clause of the Federal Constitution depended upon the following requirements:

(a) Under that Clause as construed by the Supreme Court, it was assumed that a state had the *duty* to recognize a divorce pronounced in a sister state X:

- (i) When both parties were domiciled in X; ¹⁷
- (ii) (Probably) when the defendant was domiciled in X;
- (iii) When the plaintiff was domiciled in the state *and*, in addition, one of the following three conditions was fulfilled, viz., that:

¹⁴ *Harvey v. Farnie* [1880] 5 P. D. 153, cited *supra* n. 6; *Pemberton v. Hughes* [1899] 1 Ch. 781; *Bater v. Bater* [1906] P. 209, cited *supra* n. 5; *Mezger v. Mezger* [1937] P. 19, [1936] 3 All E. R. 130.

¹⁵ Selected older literature is listed by 1 BEALE 467 n. 3; GOODRICH 345 n. 29. For recent literature see *supra* p. 390, n. 12.

¹⁶ *Williams et al. v. North Carolina* (1942) 317 U. S. 287, 143 A. L. R. 1273.

¹⁷ Restatement § 110; *Haddock v. Haddock* (1906) 201 U. S. 562 at 570.

X is the state where the parties lived together for the last time before they separated¹⁸ or

The defendant has been personally served with process or voluntarily appeared in X¹⁹ or

(In a disputed opinion) the defendant has caused the parties to be separated by his or her marital misconduct.²⁰

Inversely, no state, in the prevailing opinion, was obligated to recognize a divorce pronounced by a sister state, if the plaintiff alone was domiciled in the divorce state and none of the three additional facts also appeared, particularly when the court had assumed jurisdiction only on the ground of constructive service of process on the defendant.²¹ According to the Restatement,²² such a divorce would be void even in the state where it was rendered; this view, however, has been generally disapproved.²³

Without the obligation of the Full Faith and Credit Clause, the majority of the states also recognize a divorce granted a resident plaintiff as valid when the defendant has been served by publication only.²⁴ A small minority, however, have refused recognition either generally or when, at the time of the decree, the defendant was domiciled within the forum of recognition or in a third state which did not recognize the divorce.²⁵

¹⁸ *Atherton v. Atherton* (1901) 181 U. S. 155; *Thompson v. Thompson* (1913) 226 U. S. 551; *Crimm v. Crimm* (1924) 211 Ala. 13, 99 So. 301.

¹⁹ *Cheever v. Wilson* (1870) 9 Wall. 108, 19 L. Ed. 604; for state cases, see 1 BEALE 506 n. 7.

²⁰ *Ditson v. Ditson* (1856) 4 R. I. 87; "generally accepted as law in the United States," JACOBS, *Cases and Other Materials on Domestic Relations* (ed. 2, 1939) 354 n. 2.

²¹ *Haddock v. Haddock* (1906) 201 U. S. 562.

²² Restatement § 113 comment g.

²³ BINGHAM, "The American Law Institute vs. the Supreme Court," 21 Cornell L. Q. (1936) 393. At present, however, Mr. Justice Frankfurter, in his concurring vote in the *Williams* case postulates equal treatment of divorce decrees in all jurisdictions.

²⁴ *Miller v. Miller* (1925) 200 Iowa 1193, 206 N. W. 262.

²⁵ New York, Massachusetts, North Carolina, Pennsylvania, and others which

In principle, a divorce rendered in a state in which neither of the parties was domiciled is not recognized, irrespective of whether the defendant was personally served or put in an appearance.²⁶ This is fundamental.

(b) This set of rules has been modified by the *Williams* case to an extent still discussed. To an unbiased mind, however, the impression made upon most practical lawyers²⁷ appears right; the decision eliminates the alternative requirements described under (iii) above altogether, so as to hold it unqualifiedly sufficient that the decree be rendered at the domicile of the plaintiff. This construction of the case is supported by the facts of the twin cases decided, as the Nevada court had taken jurisdiction in the one case on service by publication and in the other by personal service beyond the jurisdiction of the court. The express declaration of the Supreme Court that *Haddock v. Haddock* is overruled, therefore, should not be taken as an *obiter dictum* or a non-committal announcement of a future policy. Not even wrongful desertion of the wife by the husband, according to the majority of the Justices, is relevant to the jurisdictional question whether the new domicile of the husband suffices for the purpose of divorce. A divorce pronounced in the state of the plaintiff's domicile ought to be recognized in any state including that of the defendant's domicile or that of the former matrimonial domicile. Whatever criticism may be aroused, it may be justifiably claimed that the decision frees courts and lawyers from "hopeless refinements",²⁸ as well as from many extremely difficult fact find-

are variously listed by the writers; *cf.*, for instance JACOBS, "Attack on Decrees of Divorce," 34 Mich. L. Rev. (1936) 749, 756 n. 38; VREELAND 327, 328; GOODRICH 348, n. 40.

²⁶ *Bell v. Bell* (1901) 181 U. S. 175; *Andrews v. Andrews* (1903) 188 U. S. 14; *Jardine v. Jardine* (1937) 291 Ill. App. 152, 9 N. E. (2d) 645; *Voorhis v. Voorhis* (1936) 184 La. 406, 166 So. 121; Restatement § 111.

²⁷ See in particular the Annotation in 143 A. L. R. 1294ff., as against the subtle polemics by BINGHAM, "Song of Sixpence," 29 Cornell L. Q. (1943) 1.

²⁸ Mr. Justice Frankfurter's concurring opinion in the *Williams* case, *supra* n. 16, at 307.

ings,²⁹ and narrows considerably the number of cases where the validity of the divorce and of a remarriage is subject to contrary holding in different states.

An unfortunate feature of the case is due to the fact that the majority of the Supreme Court, for certain technical reasons which are approved by learned critics,³⁰ failed to enter into a discussion of the question whether the two plaintiffs, Mr. Williams and Mrs. Hendrix, actually were domiciled in Reno. The court in Reno established its jurisdiction on their residence, during the six weeks prescribed, in the "Alamo Auto Court" of Reno. The very fact that awakened the indignation of the courts in North Carolina, to which the victorious parties brazenly returned immediately as newly married husband and wife, remained outside of the decision. Yet the doctrine that divorce judgments must be supported at least by bona fide domicile of one of the parties within the state of judgment should not be regarded as weakened, and it is also to be hoped that re-examination by the court of recognition of the facts evidencing such domicile will not be further impeded.

(c) Either under the doctrine of equitable estoppel or under the doctrine regarding the invoking of jurisdiction, several courts, particularly those of New York,³¹ have developed a bar to the impeachment of an invalid divorce. A person who has been an active party to a divorce suit or a person who has in some way profited from a divorce, for instance by remarrying, is not allowed to allege the invalidity of the divorce. This doctrine results in consequences which approach recognition of decrees that would otherwise have been

²⁹ Note, 143 A. L. R. 1296ff.

³⁰ BINGHAM, 29 Cornell L. Q. (1943), *supra* n. 23, at 3: "few lawyers will disagree." But see the dissenting vote in the Williams case, *supra* n. 16, by Mr. Justice Jackson, at p. 320 under "III, Lack of domicile."

³¹ *In re Ellis' Estate* (1893) 55 Minn. 401, 412, 413, 56 N. W. 1056, 1059, 1060; *Kelsey v. Kelsey* (1922) 197 N. Y. Supp. 371, *aff'd* 237 N. Y. 520, 143 N. E. 726; *Krause v. Krause* (1940) 282 N. Y. 355, 26 N. E. (2d) 290; *Maloney v. Maloney* (1940) 22 N. Y. Supp. (2d) 334. Restatement § 112.

held void or voidable. But the application of the doctrine is confused and uncertain.³²

(d) Another limitation on the right to impeach a foreign divorce decree involves the review of jurisdictional facts. On general principles, the court where recognition is sought would be free to reopen the question whether the plaintiff was domiciled within the state of judgment or whether the defendant unjustifiedly deserted the plaintiff, as facts upon which the jurisdiction for granting divorce was based. A recent decision of the United States Supreme Court, however, seems to indicate that the forum is bound to give full faith and credit to the finding of the divorce court when the defendant put in a special appearance and litigated the question of domicile or desertion.³³

Most influential is the tendency of courts, disturbed by the inconsistent treatment of divorces in the different states, to cover up defects in the jurisdictional justification of divorce decrees or, in the apt description by Lorenzen, "to close their eyes to the actualities of the situation and to allow juries to find the existence of a bona fide domicile in the state of divorce on technical grounds."³⁴ What palpably constitutes a temporary stay of a plaintiff ready to return to his real home immediately upon rendition of the decree, is dissembled as a domicile replacing it for good, first by the divorce forum and subsequently by that of recognition.

³² Cf. JACOBS, "Attack on Decrees of Divorce," 34 Mich. L. Rev. (1936) 749, 771; Note, 40 Col. L. Rev. (1940) 1255 and literature cited therein; Note, 122 A. L. R. (1939) 1321. Cf. the *caveat* in Restatement § 112.

³³ Davis v. Davis (1938) 305 U. S. 32; Case note, 6 U. of Chi. L. Rev. (1939) 290; Note, 3 U. of Detroit L. J. (1939) 32; Note, 118 A. L. R. (1931) 1524; cf. other applications of the theory: Stoll v. Gottlieb (1938) 305 U. S. 165; Chicot County Drainage District v. Baxter State Bank (1940) 308 U. S. 371, rehearing denied (1940) 309 U. S. 695. See also FARRIER, "Full Faith and Credit of Adjudication of Jurisdictional Facts," 2 U. of Chi. L. Rev. (1935) 552; and Note, 53 Harv. L. Rev. (1940) 652.

³⁴ LORENZEN, "Haddock v. Haddock Overruled," 52 Yale L. J. (1943) 341, 348, 352, 353.

(e) A divorce rendered in a foreign country is, of course, not covered by the Full Faith and Credit Clause. Nevertheless, a state will ordinarily recognize such a divorce under the same circumstances that it gives credit to a sister state's decree.³⁵ Also the method followed in ascertaining the domicile of the divorced party ordinarily is that customary in American courts rather than determination according to the view of the foreign divorce court.³⁶ Yet it has been decided in agreement with the foreign law whether a married woman shares the domicile of her husband.³⁷ Differences from the treatment of American decrees are most likely to occur in the respect that the place of domicile is more easily to be found situated in an American state than in a foreign country.³⁸ But in *Gould v. Gould*, the Court of Appeals of New York, although stating that the domicile of the parties had remained in New York, held their bona fide residence in France sufficient for recognition of the French decree, in deviation from the doctrine of *Andrews v. Andrews*; ³⁹ it was, however, a special case. Since both parties had appeared in the French suit and the decision was based on New York law, the court held that "under the circumstances of this case, the policy of this state is not offended by the recognition."⁴⁰

(f) Judicial separation, granted at the matrimonial domicile, has been held by the United States Supreme Court

³⁵ For recent cases see Note, 143 A. L. R. at 1313; cf. HACKWORTH, 2 Digest of International Law (1941) 382 s. 168.

³⁶ RG. (Nov. 21, 1929) 126 RGZ. 353, JW. 1930, 1309 no. 14 (the German court, in an Iowa case, respects whatever method is followed in the United States).

³⁷ *Torlonia v. Torlonia* (1920) 108 Conn. 292, 142 Atl. 843.

³⁸ See *supra* p. 140, n. 157.

³⁹ 188 U. S. 14.

⁴⁰ (1923) 235 N. Y. 14, 29, 138 N. E. 490, 494. STUMBERG 281 n. 82 thinks estoppel was the ground of the decision. In the discussion of the American Law Institute, 4 Proceedings, Appendix (1926) 348, 354 Judge Page observed that the matrimonial domicile was in Paris; Professor Beale declared himself extremely well satisfied by this statement. The court seems to have affirmed the domicile in New York for reasons lying outside of the case.

to be entitled to recognition under the Full Faith and Credit Clause.⁴¹

More generally, it has been concluded from the cases that whenever a decree for judicial separation is granted under circumstances such as would have supported jurisdiction for absolute divorce in the sense of the Full Faith and Credit Clause, recognition cannot be withheld.⁴²

Traditionally, however, where statutes have requirements for judicial separation different from those for dissolution of marriage, separation may be granted on the basis of personal jurisdiction, residence of both parties being sufficient. This, it is understood, only "protects the spouse against certain acts of the other spouse while they are within the state,"⁴³ without extraterritorial effect.⁴⁴

3. France⁴⁵

France has no written law on the recognition of foreign divorce decrees, but the practice has developed, in addition to the rules concerning foreign judgments in general, certain peculiarities as regards foreign judgments affecting status and capacity of individuals.⁴⁶ It seems, however, that a sharp distinction is to be made between divorces in which at least

⁴¹ *Thompson v. Thompson* (1913) 226 U. S. 551; cf. GOODRICH 353 n. 59. Note, 33 Yale L. J. (1924) 426.

⁴² Restatement § 114 comment b; STUMBERG 292; GOODRICH 354 n. 61. In the cases concerning extraterritorial effect of divorce decrees, a state may refuse to give effect to a limited divorce, while it would recognize a decree of absolute divorce, *Pettis v. Pettis* (1917) 91 Conn. 608, 101 Atl. 13.

⁴³ Restatement § 114 comment a.

⁴⁴ There is no authority, GOODRICH 352, 353.

⁴⁵ See DEGAND, 5 Répert. 559 and (with reference to the almost identical Belgian law) POULLET, nos. 500-504; *Novelles Belges*, 2 D. Civ. Divorce, nos. 1760, 1761. A report was issued by the French Ministry of Foreign Affairs and reproduced in the decision of the German RG. (March 19, 1936) 150 RGZ. 374, Clunet 1939, 122.

⁴⁶ The subject matter of the practice is extended by LEREBOURS-PIGEONNIÈRE 360 no. 310 to all judgments which modify a legal situation (*Gestaltungsurteile* in the German doctrine).

one party is of French nationality and those in which both are foreigners.

(a) If both spouses are of foreign nationality, foreign divorce decrees, like other foreign judgments creating or modifying status and capacity, are held effective without exequatur by the French courts for purposes not requiring physical execution on property or coercion of persons.⁴⁷

Neither the conditions nor the scope of this rule are settled, with respect to which the courts seem to enjoy almost absolute discretion. One condition certainly is that the decree conform to the requirements of both judicial jurisdiction and choice of law by the national law or laws of the parties, in respect to which points at least a few cases have been re-examined by French courts.⁴⁸ Often, public policy may intervene, especially when a fair opportunity for defense appears to have been lacking.⁴⁹

Without being made executory by exequatur, a foreign divorce decree has the effect of forming a proper basis for remarriage before a civil official⁵⁰ and has been held in a much discussed decision to mark the beginning of the three months during which a divorced wife under French law⁵¹ must claim,

⁴⁷ The principle initiated by the Court of Cassation in 1860 (*infra* n. 50) was confirmed and formulated in Cass. (civ.) (May 9, 1900) S.1901.1.185; App. Aix (July 9, 1903) D. 1905.2.73, S.1906.2.257; *cf.* WEISS, 6 *Traité* 41ff.; and with final clarifications in Cass. (req.) (March 3, 1930) S.1930.1.377; *cf.* NIBOYET, 5 *Zausl.PR.* (1931) 479. Occasionally, it is true, exequatur is asked and granted without apparent necessity; see App. Agen (July 29, 1936) *Revue Crit.* 1937, 721 and the Note *ibid.* (annulment in Chile).

⁴⁸ Cass. (civ.) (May 9, 1900) S.1901.1.185; Trib. civ. Seine (March 16, 1935) *Revue* 1936, 519 (the Supreme Council of the Armenian Church in Constantinople no longer had divorce jurisdiction).

⁴⁹ Cass. (civ.) (May 9, 1900) S.1901.1.185; Trib. civ. Seine (June 29, 1938) *Clunet* 1939, 61 (rejecting a decree of Cuernavaca, Mexico). *Cf.* App. Aix (March 27, 1890) and Cass. (civ.) (Oct. 25, 1892) S.1893.1.505; Cour Paris (July 2, 1934) *Revue Crit.* 1936, 500 (recognizing a decree of the Supreme Court of Rhode Island granted by default against the husband who was notified of the decree and failed to appeal; the note finds this holding "too absolute").

⁵⁰ Cass. (civ.) (Feb. 28, 1860) S.1860.1.210. The writers base the custody of children on the foreign divorce decree.

⁵¹ C. C. art. 1463.

or otherwise lose, any participation in marital community property.⁵² These decisions are understood to express the idea that a final foreign divorce decree of foreigners is assimilated to a French decree. A foreign judicial separation, if recognized, may be converted into divorce.⁵³

Application for exequatur, however, is necessary not only if execution is sought, as for alimentary rights or rights of restitution, but also if, in litigation between the spouses, one of them denies the validity of the divorce. In a case where divorce had been granted in the United States at the instance of the husband, the wife sued for divorce again in France; the mere fact that she challenged the American decree persuaded the Court of Cassation to prevent recognition otherwise than by means of exequatur proceedings.⁵⁴ Further, the regular record of divorce at the registry of civil status, essential for terminating marital liability of spouses against third persons, cannot be obtained without exequatur.⁵⁵

This system has been adopted in several countries⁵⁶ but has been criticized by French⁵⁷ as well as by Italian writers,⁵⁸

⁵² Cass. (req.) (March 3, 1930) S.1930.1.377 cited *supra* n. 47.

⁵³ Cass. (civ.) (July 6, 1922) D.1922.1.137, S.1923.1.5; Trib. dép. Alpes-Maritimes (Oct. 25, 1927) Revue 1928, 328.

⁵⁴ Cass. (req.) (Nov. 11, 1908) Revue 1909, 227, Clunet 1909, 753, S.1909.1.572.

⁵⁵ Trib. civ. Seine (May 19, 1926) La Loi, Dec. 30, 1927. Cf., on the effect of omission of transcription, Trib. civ. Seine (May 27, 1938) Nouv. Revue 1938, 326. Marginal entry in the register is allowed but has informational, not legal, effect.

⁵⁶ See, for instance, for Belgium cases cited in *Novelles Belges*, 2 D. Civ. (*supra* n. 45).

For Brazil: App. Civ. Rio de Janeiro (Dec. 9, 1922 and April 15, 1926) no. 5405, 81 Revista Dir. Civ. (1926) 174ff.; App. Civ. Rio de Janeiro (Oct. 25, 1927) no. 2.980, 86 Revista Dir. Civ. (1927) 389. The problem is discussed, however, see J. M. DE CARVALHO SANTOS, 9 Código de Processo Civil Interpretado (1941) 21ff.; I. BORGES DA ROSA, 4 Processo Civil e Comercial Brasileiro (1941) 328ff.; JOÃO M. CARNEIRO LACERDO, 4 Código de Processo Civil Brasileiro (1941) 373ff.

⁵⁷ BARTIN, 1 Principes § 190; NIBOYET 952ff. nos. 850-852; PERROUD, 5 Répert. 384 nos. 147, 148.

⁵⁸ ANZILOTTI, 1 Rivista (1906) 227; 5 *ibid.* (1910) 131; see further citations in MORELLI, Dir. Proc. Civ. Int. 289 n. 1.

who have influenced their courts to the extent that, according to the opinion now prevailing in Italy, a foreign judgment never has binding effect unless it has been rendered executory by proceedings of *delibazione*.⁵⁹ Similarly, a Brazilian tradition requires foreign judgments declaratory of personal status to be submitted to "*homologação*" (confirmation).⁶⁰

(b) In cases where a French national is a party, a decree of exequatur seems to be indispensable for all purposes,⁶¹ the question whether a person is a French national being again reserved to the French courts.⁶² Such a decree must be sought in a special proceeding in the same way and under the same conditions as in all cases of foreign judgments. Just what is the subject matter of this proceeding is highly controversial, but there is no doubt that, despite all contrary theories, the courts reserve to themselves the right to unlimited re-examination of every point of procedure and substantive law and even of the facts of the case,⁶³ although they may not exercise this control completely in every case. Ordinarily, they will investigate whether the divorce was based on a ground acknowledged by the French municipal law.⁶⁴ Where, for instance, a Swiss court pronounced divorce on the ground of disruption of marriage (C.C. art. 142), the decree was not recognized, the cause not

⁵⁹ Italian C. Civ. Proc. art. 941 (as amended in 1919). In most of its recent bilateral treaties, however, Italy has required an action for executory confirmation only for the purpose of forcible execution; see PERASSI in 17 Rivista (1925) 109; UDINA, Elementi 95. Thus, in relation to Switzerland, no exequatur is required; see Note of the Italian Government to the Swiss Government, BBl. 1938, II 499 no. 8.

⁶⁰ Sup. Trib. Fed. (July 24, 1920) no. 714 24 Revista Sup. Trib. (1920) 356; BEVILAQUA 446.

⁶¹ Circular letter by the State's attorney of Paris, July 25, 1887, Clunet 1892, 644. Nouvelles Belges, 2 D. Civ., Divorce no. 1760. Exceptions advanced by AUDINET, 11 Recueil 1926 I 240 n. 4, have been very rare.

⁶² App. Aix (June 4, 1912) S.1913.2.92; cf. Trib. civ. Seine (Réfères) (Nov. 9, 1920) Revue 1921, 526.

⁶³ GLASSON et TISSIER, 4 Traité de Procédure Civile (ed. 3, 1932) nos. 1015, 1016 and 5 *ibid.* Suppl. no. 1015 *bis*.

⁶⁴ This includes at present the statutory provision of 1941 (amending C. C. art. 233) that no marriage can be divorced in its first three years; see JACOBS, "Problems of Divorce in France," 28 Iowa L. Rev. (1943) 286 at 311.

being existent under French law.⁶⁵ But it has rather astonished the commentators that the Court of Appeals of Paris, in an exclusively foreign case involving an Argentine husband and his American wife, refused exequatur to a divorce decree of the Court of Monaco on the ground that the husband had in fact never resided in Europe, although both parties had been fully represented in the suit and only the parents of the husband wanted to prevent recognition of the divorce in order to keep their son from concluding another marriage.⁶⁶ French courts always feel repugnance to collusive influence on judicial acts.

4. Germany ⁶⁷

The statutory provisions laid down in section 328 of the Code of Civil Procedure concern the conditions of both recognition and enforcement of foreign judgments in general. This regulation is complete and the most elaborate of all, but questionable in form and substance; it also has a peculiar disadvantage in application to divorce, since its principles were evolved without regard to the rules of conflict of laws contained in E.G., article 17. Questions governed by both sets of rules, which are incongruous and overlap, have been difficult to settle. The final result, however, may be briefly presented as follows:

(a) Where both parties are nationals of the country of divorce, a final divorce decree is almost always granted recognition and enforcement.⁶⁸ There is, of course, one self-evident

⁶⁵ Trib. civ. Seine (June 10, 1936) D. H. 1936. 420.

⁶⁶ Cour Paris (March 24, 1930) Revue 1930, 272 criticized by NIBOYET, *ibid.* In the decision of Cass. (req.) (Nov. 11, 1908) S.1909.1.572, *supra* n. 54, a divorce decree of Pensacola, Florida, was declared ineffective because the husband was found to have obtained the decree by declaring under oath false facts supporting jurisdiction.

⁶⁷ STEIN-JONAS, 1 ZPO. § 328 II; RAAPE 418-424; WIERUSZOWSKI in 4 Leske-Loewenfeld I 93.

⁶⁸ RG. (Feb. 28, 1938) JW. 1938, 1518; see also RG. (Jan. 5, 1925) 109 RGZ. 383, JW. 1925, 765, Clunet 1926, 173 (Czechoslovakian decree); KG. (Dec. 21, 1935) JW. 1936, 2466, Nouv. Revue 1937, 98 (Hungarian decree upon a ground of alleged collusion of the parties). The same point of view was observed in Austria, see WALKER 729, 730.

condition—the decree must not violate German public policy (C. Civ. Proc. § 328, par. 4)—but seldom can the matter be connected with German interests closely enough to affect them.⁶⁹

For a time it was doubtful whether recognition was to be extended to the case where the husband is a domiciliary of Germany. Now the prevailing opinion is in the affirmative.⁷⁰

(b) According to the system of the procedural code, the solution stated above should also govern the case where both parties are of foreign nationality but have obtained their divorce in a third country. But, under the principle of nationality adopted in the German conflicts rules, a divorce may not be recognized unless it agrees with the law of the national country of the husband. The second view prevails in the recent literature. In summary, a decree concerning two foreigners is certain to be recognized if it is rendered at the marital domicile and recognized by the husband's national country.⁷¹

(c) Where one party is of German nationality, the divorce decrees of many countries are not recognized because reciproc-

⁶⁹ RAAPE 419. A divorce decree validly rendered by the national court of the spouses by default was recognized, although not in conformance with German divorce procedure, LG. Dresden (Oct. 16, 1935) JW. 1935, 3493. The OLG. Hamburg (Oct. 1, 1935) JW. 1935, 3488 held a Mexican decree void because obtained in a shocking manner, but this decision has been criticized, since the husband was an American citizen domiciled in New Jersey and the wife had lost her German nationality by her marriage, JONAS, JW. 1936, 283; LORENZ, 6 Giur. Comp. DIP. 326. The decree would not have been recognized in New Jersey, however, if properly attacked, and could be disregarded for this reason in Germany. Jonas thought that as the husband had remarried in New Jersey the divorce was recognized there.

⁷⁰ If the husband is domiciled in Germany, either spouse may sue at his domicile, C. Civ. Proc. § 606 par. 1. Where jurisdiction is granted in Germany, there is no recognition without reciprocity, C. Civ. Proc. § 328 par. 2. Hence, even with respect to foreigners recognition seems to be excluded in most cases, M. WOLFF, IPR. 83. This, however, makes no sense; see NUSSBAUM, D. IPR. 441; RAAPE 418 and 2 Dt. IPR. 186; BERGMANN, StAZ. 1935, 104; JONAS, JW. 1934, 2555; MASSFELLER, StAZ. 1937, 226.

⁷¹ I FRANKENSTEIN 345ff.; RAAPE 422; JONAS, JW. 1934, 2555 and *ibid.* 1936, 283; MASSFELLER, StAZ. 1937, 227; *contra*: LEWALD 128 no. 174; KIPP-WOLFF, Familienrecht (1928) 148 § 39 n. 47 and IPR. 83; WIERUSZOWSKI in 4 Leske-Loewenfeld I 38 and *ibid.* 76.

ity of recognition is not guaranteed (C. Civ. Proc. § 328, par. 2, *cf.* § 606, par. 2 and the Law on Divorce of Jan. 24, 1935, art. 2, par. 2). The list of countries guaranteeing reciprocity, however, is not altogether confined to those countries that have concluded treaties on recognition with Germany or to those recognizing all German judgments; it suffices that German divorce decrees are regularly recognized. Therefore, the list has been believed to be rather comprehensive.⁷²

However, relations with Great Britain and the United States in particular are in doubt. Leading authorities declare that in neither country is there any certainty of recognition because courts in common law countries are prepared to re-examine the jurisdiction of the individual German tribunal and that English courts in particular may inquire into the question of fraud.⁷³ On the contrary, as a practical matter, one may presume that, in most courts of the United States, German divorce decrees rendered at the domicile of one party are enforced with greater probability of excluding defenses than in Germany.⁷⁴

Again, even divorces rendered in one of the countries with which reciprocal recognition is assumed to exist, such as Denmark, Norway, Rumania (old territory), or the Netherlands, must comply with a number of other requirements. Recognition is denied, if the husband is domiciled in Germany;⁷⁵ or if the wife is a German national and domiciled in Germany;⁷⁶ or if the losing defendant is a German national and in the

⁷² See especially WIERUSZOWSKI, 4 Leske-Loewenfeld I 88-92; and for instance AG. Hannover (Oct. 26, 1931) IPRspr. 1932, no. 73 (Uruguay); KG. (Dec. 19, 1932) *ibid.*, no. 74 (Yugoslavia).

⁷³ STEIN-JONAS, 2 ZPO. § 328 (ed. 16, 1938) nos. 110, 132; RAAPE, 2 D. IPR. 185 considers the position of England and Sweden not clear.

⁷⁴ See FELLER, "Die Vollstreckbarkeit von Urteilen amerikanischer Gerichte in Deutschland," JW. 1931, 112; RUD. MUELLER, "Die Anerkennung von Urteilen, Beschlüssen und Anordnungen ausländischer Gerichte und von ausländischen Schiedssprüchen im Recht der Vereinigten Staaten von Amerika," 5 Z.ausl.PR. (1931) 905 (on divorce) 927; KG. (May 3, 1935) JW. 1935, 2750 (as to Illinois).

⁷⁵ C. Civ. Proc. § 328 par. 1; *cf. ibid.* § 606 par. 1.

⁷⁶ C. Civ. Proc. § 606 par. 2 and Law on Divorce of Jan. 24, 1935, art. 2.

suit was not served personally through the German authorities;⁷⁷ or if divorce was granted on a ground unknown to German law and without stating facts which constitute a sufficient ground for divorce under German law;⁷⁸ or if divorce was denied to the disadvantage of a German party, while it should have been granted according to German law;⁷⁹ and finally also, if the decree is at variance with German public policy. In the case of German parties, this last point includes numerous possibilities, most of which are covered by the other conditions of recognition.⁸⁰ In fact, not often is a foreign divorce concerning a German subject recognized except by virtue of some international treaty.

5. Soviet Union

In consequence of the principle that either spouse is able to terminate the marriage at his pleasure, it is presumed in Soviet Russia that any act of an authority in other countries designed to dissolve a marriage of Soviet citizens is supported by the intention of at least one party and therefore valid as a nonregistered divorce. A decree of the People's Commissary of Justice of July 6, 1923,⁸¹ states that every dissolution of marriage obtained in a foreign country according to the local laws will be recognized in the U.S.S.R., irrespective of where and when the dissolved marriage was celebrated, unless the marriage of a Soviet citizen has been dissolved or annulled on formal grounds contrary to the will of both spouses.⁸² No

⁷⁷ C. Civ. Proc. § 328 par. 1 no. 2; RG. (June 15, 1936) JW. 1936, 2456.

⁷⁸ C. Civ. Proc. § 328 par. 1 no. 3; cf. EG. art. 17 par. 4.

⁷⁹ Same provision as *supra* n. 78.

⁸⁰ RAAPE 410.

⁸¹ Sec. 2 of the Decree, which in German translation was reproduced and analyzed together with the Circular letter of the People's Commissary of the Interior of June 2, 1921, no. 19 and the Decree of the Commissary of Justice of Feb. 21, 1927, by H. FREUND, *Das Zivilrecht in der Sowjetunion* (1927) I, in 4 *Die Zivilgesetze der Gegenwart* 71; H. FREUND, *Das Zivilrecht Sowjetrusslands* (1924) 69; Makarov, *Précis* 399; see also German RG. (June 24, 1927) IPRspr. 1926-27, no. 70; Swiss BG. (June 15, 1928) 54 BGE II 225, 228, 231.

⁸² On the limitation expressed in the last sentence, see German RG. (April 4, 1928) 121 RGZ. 24, 27.

provision has been held necessary in the case where only one party is of Soviet nationality.⁸³

6. The Hague Convention on Divorce

By the Hague Convention on Divorce, article 7, the member states agree to recognize a divorce or separation decreed by a court competent according to the Convention, provided the dispositions of the Convention have been observed, and, in case the decision has been rendered by default against a defendant who fails to appear, he has been cited in accordance with the special provisions of his national law for the recognition of foreign judgments.⁸⁴

A divorce or separation decreed by an administrative jurisdictional authority shall likewise be recognized everywhere, if the law of each of the spouses recognizes such divorce or separation.

Since under articles 1 and 2 the national law of the parties must be observed by the divorce court, recognition depends upon a re-examination of facts and motives.⁸⁵

The Convention is understood not only to authorize but to obligate the courts to refuse recognition, if the treaty requirements are not satisfied.⁸⁶

7. Latin-American Conventions

The Montevideo Treaty provides for reciprocal recognition of divorces decreed at the matrimonial domicile,⁸⁷ or at the last matrimonial domicile, in case the parties have been judicially separated or, according to the recent draft, the wife has been deserted and has not established a new domicile of

⁸³ MAKAROV, *Précis* 400 with hypothetical comment.

⁸⁴ For comment see MEILI-MAMELOK, *IPR.* 240 § 45.

⁸⁵ LG. München I (Jan. 17, 1908) 4 *Z. Rechtspflege Bayern* (1908) 295.

⁸⁶ App. Milano (Nov. 21, 1906) *Monitore* 1907, 133, 3 *Rivista* (1908) 390, *Clunet* 1908, 1267; KOSTERS 528; LEWALD in Strupp, 1 *Wörterbuch des Völkerrechts und der Diplomatie* 470 VII; 3 FRANKENSTEIN 571 n. 104; VREE-LAND 229.

⁸⁷ Treaty on international civil law (1889) art. 13, (1940) art. 15.

her own.⁸⁸ This simple principle was incorporated in the *Código Bustamante* which for once, abandoning its neutrality to the criterion of the personal law, prescribes that the law of the matrimonial domicil is to apply.⁸⁹ Of course, the court must have observed the treaty requirements respecting the applicable law, which are not quite so simple in the Havana Convention as in the Treaty of Montevideo. The reservations for non-recognition vary in scope. The *Código Bustamante*⁹⁰ reserves to "each contracting state the right to permit or recognize, or not, the divorce or new marriage of persons divorced abroad, in causes which are not admitted by their personal law." The reservation contained in the new draft of the Montevideo Treaty is much more restricted; it covers only the case where the country of celebration does not permit divorce and grants the right to refuse recognition on this ground only to this country.⁹¹

8. The Scandinavian Convention on Family Law of 1931⁹²

This Convention assures reciprocal recognition, without confirmation or re-examination, of all decisions rendered in matrimonial causes according to the treaty provisions. Actions for separation or divorce between nationals of the participating states are decided, under the basic rule of these provisions, according to the law of the state where both parties are domiciled or where they had their last common domicil, if one of them is still domiciled there.

There are, thus, no defenses to a divorce decree of another Scandinavian country, except that the case does not come under the Convention or, perhaps, that the matter is pending in the forum.⁹³

⁸⁸ Treaty on international civil law (1940) art. 59 par. 2 with art. 9.

⁸⁹ Art. 56.

⁹⁰ Art. 53, see comment by BUSTAMANTE, *La commission des jurisconsultes de Rio* 121.

⁹¹ (1940) art. 15(b). See *supra* p. 427.

⁹² Art. 22 referring, among others, to arts. 7, 8, 10.

⁹³ Art. 7 par. 1.

Other inter-Scandinavian conventions provide for the mutual enforcement of alimentary awards (Feb. 10, 1931) and other judgments (March 16, 1932).⁹⁴

9. Bilateral Treaties

Before the first World War, very few conventions existed for securing mutual enforcement of judgments; the most outstanding is still in force—the French-Swiss Treaty of June 15, 1869, which, according to present prevailing opinion, is applicable also to divorce decrees.⁹⁵ In the nineteen-twenties, a wave of international adjustment in Europe brought about a series of treaties for reciprocal judicial assistance, especially through negotiations of France, Germany, Italy, and the states succeeding the Austro-Hungarian monarchy.⁹⁶

Great Britain, however, while also endeavoring to establish a system of reciprocal recognition upon a treaty basis, has concluded only two treaties with foreign countries, the first of which, with France, declares itself inapplicable to matters of status and capacity⁹⁷ and the second, with Belgium, renders inoperative its most important provision with respect to these matters.⁹⁸

⁹⁴ See BLOCH, 8 Z.ausl.PR. (1934) 627, 636.

⁹⁵ See SECRETAN, *Revue* 1926, 199; DEGAND, 5 *Répert.* 574 no. 193. The contrary view formerly frequent in Switzerland is maintained by GAUTSCHI, 26 SJZ. 1929, 1. The treaty also covers recognition of measures ancillary to divorce, such as awarding custody of children. See Cass. (req.) (Nov. 3, 1936) *Clunet* 1937, 293. The French-Belgian Treaty of July 8, 1899, was facilitated by the identical codes; see on the content, PERROUD, 5 *Répert.* 409.

Also still in force is the Treaty between Colombia and Ecuador of June 18, 1903 on international private law, art. XVI of which deals with divorce, only to deny the right of remarriage if the divorce fails to agree with the law of the other state.

⁹⁶ On the French-Italian Treaty of June 3, 1930, see PERROUD, *Clunet* 1934, 275; on art. 3 of the German-Swiss Treaty of Nov. 2, 1929, 109 *League of Nations Treaty Series* (1930-1931) 274, see VORTISCH, 10 Z.ausl.PR. (1936) 17; KG. (May 25, 1936) JW. 1936, 3577; JONAS, *ibid.*; LORENZ, 7 *Giur. Comp. DIP.* no. 33. On the application of the Italian-Swiss Treaty of Jan. 3, 1933, to matters of status, see App. Roma (Nov. 27, 1934) with Note, SCERNI, 3 *Giur. Comp. DIP.* no. 31 and the cases cited *infra* p. 483, n. 100.

⁹⁷ Treaty of Jan. 18, 1934, art. 2 § 3b, 171 *League of Nations Treaty Series* (1936-1937), 183 at 186.

⁹⁸ Treaty of May 2, 1934, art. 4(3), 173 *League of Nations Treaty Series* (1936-1937) 291 at 299.

II. PARTICULAR PROBLEMS

As the general doctrine of recognition and enforcement of judgments ought to be discussed in its proper place, topics involved in this problem, such as jurisdiction of the foreign court, finality and conclusiveness of the decision, reciprocity, opportunity for defense, and fraud, cannot be treated at length here. There are, however, a few typical situations found in the field of foreign divorces, which permit comparative survey. Courts in contemplating such groups of cases may apply different legal categories to obtain the same result; indeed, several of the numerous legal requisites for recognition may be invoked at once without entirely exact discrimination, if a court feels that the foreign divorce decree should not be accepted.

1. Scope of Recognition as Contrasted with Enforcement

Recognition, as contrasted with enforcement,⁹⁹ has more importance in the matter of divorce decrees than in ordinary judgments, but the effects of recognition are not uniformly determined.

(a) Usually, as a minimum effect, a foreign divorce decree which agrees with the essentials for recognition can be set up as a defense against the alleged existence of the marriage in any suit for separate maintenance or restitution of conjugal rights, for separation, or for divorce, etc., without bringing an action on the judgment or, on the Continent, without an application for an executory decree.¹⁰⁰

⁹⁹ Cf. Restatement § 42(d); YNTEMA, "L'exécution internationale des sentences arbitrales," 2 Mémoires de l'Académie Internationale de Droit Comparé, part 3, 357; Hague Draft of a Convention on Recognition and Enforcement of Foreign Judgments, arts. I and II, Actes de la Cinquième Session 193.

¹⁰⁰ France: Cass. (req.) (March 3, 1930) S.1930.1.377; Cour Paris (July 2, 1934) Revue Crit. 1936, 500; Trib. civ. Seine (March 16, 1935) Revue Crit. 1936, 519.

Germany: C. Civ. Proc. § 328; RG. (June 24, 1927) IPRspr. 1926-27, no. 70.

Greece: App. Athens, no. 33, (1926) 37 Thémis 470 (not recognizing an American divorce); but cf. TENEKIDÈS, Clunet 1937, 598.

(b) Likewise, the decree provides full evidence of the dissolution of the marriage before a civil official or other marriage officer when remarriage is attempted.¹⁰¹ The conditions of its fitness for recognition are to be examined by the officer or any authority or court supervising him and not through an action on the judgment.¹⁰²

(c) The effects of a divorce on the name of the wife, on her ability to be reinstated in her former nationality, or on her domicile, fall within the scope of mere recognition.¹⁰³

(d) While the decree is entered upon the records of civil status without the steps necessary for enforcement, according to the German and Swiss regulations,¹⁰⁴ in France, on the contrary, transcription in the register of civil status is denied unless a decree of *exequatur* is obtained.¹⁰⁵

(e) Recognition nowhere covers the enforcement of pe-

Italy: App. Torino (July 25, 1930) *Monitore* 1930, 911, 5 *Z.ausl.PR.* (1931) 844 (see also five Italian decisions, *ibid.* 843, concerning recognition outside the Hague Convention); App. Fiume (June 10, 1937) 29 *Rivista* (1937) 398, *Clunet* 1938, 932; *cf.* SCERNI, 9 *Annuario Dir. Comp.* (1934) 340; but see *supra* p. 481, n. 96.

Scotland: The Court of Sessions, Outer House, by Lord Moncrieff, in *Arnott v. Lord Advocate* [1932] *Scots L. T.* 46, in recognizing an Ohio decree, granted a decree of declarator for exceptional aid, while as a rule the grant of a decree to give validity to the domiciliary decree which already had universal validity would "be a trespass against international comity."

Switzerland: App. Bern (July 6, 1935) 72 *ZBJV.* (1936) 429; *cf.* 11 *Z.ausl.PR.* (1937) 669 (divorce of Swiss nationals in Oregon recognized without action because the award required no enforcement); *cf.* also BECK, *NAG.* 378 no. 160.

However, in Sweden: Law of 1904 with subsequent amendments, c. 3 § 7 requires a confirmation of the foreign divorce decree for the celebration of a remarriage in Sweden.

¹⁰¹ Belgium: App. Liège (Jan. 29, 1924) *Jur. Liège* 1924, 76; *cf.* POULLET 649 n. 4.

France: Cass. (civ.) (Feb. 28, 1860) *S.1860.1.210*; see *supra* p. 472.

Germany: *RAAPE* 416 VII 1.

Switzerland: BECK, *NAG.* 379 no. 161.

¹⁰² See citations in preceding note.

¹⁰³ BECK, *NAG.* 379 no. 161.

¹⁰⁴ Germany: *RG.* (May 18, 1916) 88 *RGZ.* 244 against former practice of lower courts.

Switzerland: Civil Status Regulation § 118 par. 1.

¹⁰⁵ Trib. civ. Seine (May 19, 1926) cited *supra* p. 473, n. 55.

For Italy, *cf.* UDINA, 1 *Giur. Comp. DIP.* 150.

Portugal: Decree on Civil Status of Dec. 22, 1932, art. 391 § 2.

cuniary duties arising from the decree or of rights to exercise custody over children, or other provisional orders.¹⁰⁶ It has been asserted,¹⁰⁷ and seems correct, that recognition of a foreign divorce repugnant to the domestic principles of the forum may be granted, while executory enforcement would be denied. In the Netherlands, foreign divorces may not be executed and enforced at all but are capable of being recognized.¹⁰⁸

2. Scope of *Res Judicata*

Is full faith and credit due to a foreign decision dismissing an action for divorce on the merits? This question has arisen on the Continent, because generally defeat in a lawsuit as well as victory may constitute *res judicata*. Nevertheless, it has been argued that a subject of the forum should not be barred from suing under his own law after having been rejected under a foreign law less favorable to him. In fact, in Switzerland foreign decrees denying divorce to a Swiss citizen are said not to be entitled to recognition.¹⁰⁹ A better considered solution is given in Germany; a foreign judgment unfavorable to the application of a German national is recognized, if the decision is in conformity with German divorce law.¹¹⁰

In the United States, the binding force of a judgment dismissing a suit for divorce on the merits seems to be virtually the same whether it is rendered by a domestic or a foreign court. It could hardly be otherwise, since the divorce court applies its own law, and the forum of recognition does not re-examine the merits.

¹⁰⁶ BECK, NAG. 381 no. 168.

¹⁰⁷ JULIOT DE LA MORANDIÈRE, in República de Colombia, Comisión de Reforma del Código Civil (1930-1940) 217, 218.

¹⁰⁸ See 1 BERGMANN 404.

¹⁰⁹ See BECK, NAG. 377 no. 157.

¹¹⁰ See RAAPE 410 V 1.

3. Divorce Without Judicial Litigation

Many legislators and even treaty-makers are so accustomed to contemplate contentious proceedings and a decree of a state court as the only way to obtain divorce, that they overlook the possibility of other forms of divorce being used abroad. The difficulties of interpreting the pertinent narrowly drafted texts are increased in numerous systems, for instance, in the elaborate but contradictory and incomplete German enactments,¹¹¹ by failure to coordinate the procedural rules on recognition of foreign judgments with the choice of law rules on the extraterritorial effect of private acts and by failure to regulate clearly the recognition of foreign acts of administrative justice.¹¹²

Recognition of foreign forms of divorce unknown to the forum is traditionally barred by public policy with respect to nationals or subjects of the forum, as distinguished from foreign married couples. But the general trend is in the direction of replacing the former reluctance to recognize foreign modes of divorce by a broader-minded outlook.

(a) Decisions of foreign ecclesiastical courts are probably everywhere treated as equivalent to decrees of ordinary courts. The minority opinion is, however, that religious divorces should be recognized even when they are not supported by the consent of the state in whose territory they are rendered,¹¹³ provided only that they are recognized by the state of which the parties are nationals—a species of *renvoi*. The prevailing view¹¹⁴ requires an ecclesiastical court to be authorized by

¹¹¹ See *supra* p. 475.

¹¹² See on the "inchoate" state of the Anglo-American doctrine of administrative acts, YNTEMA, "L'exécution internationale des sentences arbitrales," 2 Mémoires de l'Académie Internationale de Droit Comparé, part 3, 348 at 354.

¹¹³ See 3 FRANKENSTEIN 560 n. 70 and the decisions cited by him.

¹¹⁴ 3 ARMINJON §§ 34, 35; M. WOLFF, IPR. 132; NUSSEBAUM, D.IPR. 164 n. 5; this also seems to be the meaning of American cases such as *In re Rubenstein's Estate* (1932) 143 N. Y. Misc. 917, 257 N. Y. Supp. 637; *In re Spondre*

the state where it is sitting, as well as by the state of which the parties are nationals or domiciliaries, according to the principle governing status.

Illustration: Orthodox Russians are divorced by the Council of the Orthodox Church in Paris, Polish Jews by a rabbi in the Netherlands, divorces not recognized by the country where pronounced nor under the prevailing opinion in third countries, but recognized by the national law. Supposing that the domicile was in the home country, the answer would probably be negative also in American courts.

Recognition of a religious decree means giving full civil effect to the divorce. Where a Bulgarian national of Orthodox faith had been married in the Netherlands to a Dutch woman according to both temporal and ecclesiastical ceremonies and the Bulgarian Church decreed divorce, the Orthodox tribunal of course considered only the religious marriage and ignored the Dutch civil ceremony. But a Netherlands court recognizing this divorce should not have assumed that the Dutch civil marriage remained undissolved.¹¹⁵

(b) Divorce or separation pronounced by an administrative jurisdictional authority has been expressly declared recognizable by the Hague Convention on Divorce (art. 7, par. 2), provided that the national law of either spouse recognizes such act. This leaves the national laws free to decide. But there is no reason why, under any system of nationality or domicile, a decree rendered in the name of the King of Denmark¹¹⁶ or by bill of Parliament (if still available) should

(1917) 98 N. Y. Misc. 524, 162 N. Y. Supp. 943; *Miller v. Miller* (1911) 70 N. Y. Misc. 368, 128 N. Y. Supp. 787; *Leshinsky v. Leshinsky* (1893) 5 N. Y. Misc. 495, 25 N. Y. Supp. 841; cf. FREEMAN, 3 *Treatise of the Law of Judgments* (1925) 3095 § 1510 formulating the condition "if valid where given."

¹¹⁵ Rb. Amsterdam (March 3, 1930) W. 1930, 12175 approved by 3 FRANKENSTEIN 409 n. 2.

¹¹⁶ On recognition of a Danish royal decree in Italy, see Trib. Roma (April 8, 1908) *Clunet* 1910, 670; Germany: KG. (Jan. 23, 1939) *Dt. Recht* 1939, 1015 no. 38 has pronounced the principle that the Danish Royal decree, as an administrative decree, is to be recognized but depends on the same conditions as a judicial

not be recognized as readily as a court decree; the protection against arbitrary dissolution seems greater than in many courts.¹¹⁷

It is true that administrative jurisdiction over divorce is usually given upon the basis of a mutual agreement of the parties, and this circumstance raises a doubt that we may consider separately.

(c) In fact, non-contentious proceedings, if followed by a decree of any independent authority, need not necessarily be regarded as an obstacle to recognition at a forum where mutual agreement is excluded by the municipal law. But in such cases difficulties have been experienced with respect to subjects of the forum of recognition and also with respect to foreigners when the forum reviews the grounds for divorce.¹¹⁸

A particular problem exists with regard to the conversion of a foreign limited divorce into a domestic absolute divorce. In several countries, a judicial separation may be transformed into a divorce *a vinculo* without proving new grounds, after some time has elapsed since the separation. This institution usually presupposes contentious litigation, in which the disruption of the marriage has been examined by a court before granting separation. If so, a separation obtained abroad upon a mere mutual agreement, as is possible in Chile, Italy, the

decree and fulfills all requirements of German C. Civ. Proc. § 328 by analogy. In the instant case recognition was refused, the husband being a German and domiciled in Germany, according to § 328 no. 1. For a Danish husband, Reg. Praes. Schleswig (Jan. 23, 1932), see StAZ. 1932, 197, b; for a Danish couple, the husband being domiciled in Brazil, see Brazil Sup. Trib. Fed. (Jan. 31, 1933) 21 Rev. Jur. Bras. (1933) 26. Cf. for various opinions, WIERUSZOWSKI, 4 Leske-Loewenfeld I 78 n. 485.

¹¹⁷ CHESHIRE 367, declaring inconceivable nonrecognition in such cases, goes too far in extending recognition to any local form. See also KEITH, "Some Problems in the Conflict of Laws," 16 Bell Yard (1935) 4 at 11.

¹¹⁸ For instance, French courts refuse recognition to a judgment on "acquiescence," regarding the procedure as affected by "irregularity," *arg. C. C. art. 92* (new, art. 249); likewise Swiss App. Freiburg i. Ue., 10 SJZ. 176, no. 49. A divorce by Danish royal decree, if the husband is a German, is not recognized in Germany, Pruss. Ministry of Interior (June 15, 1928), quoted in StAZ. 1932, 197. In many countries the matter is in doubt; also under the Hague Convention, see 3 FRANKENSTEIN 567.

Netherlands, in the countries of Austrian law, and others, cannot suffice as the only ground for an absolute divorce at the forum; this has been held in Belgium,¹¹⁹ France,¹²⁰ Hungary,¹²¹ etc. It is also agreed that the Hague Convention, in providing that separation ought to be recognized by the participant states (art. 7), means a separation pronounced by a court upon contested proceedings.¹²²

Although these limitations are reasonable, the German courts took an intransigent attitude in construing the dissolution of the conjugal union, which was the only separation admitted by the Civil Code, as a unique institution, indispensable for conversion under the Code, and hence irreplaceable by any foreign type of separation.¹²³

(d) The forms of divorce permitted by the laws of Soviet Russia have engendered special problems. Under the initial Soviet legislation of 1918, a divorce could be obtained either by mutual consent and official registration or by application of one party to a court, notice to the other party by summons, and a decree which the court was bound to give. The marriage law of 1926 emphasized still more sharply, by abandoning any court action, the nature of divorce as a private declaration that may be pronounced by one of the spouses without cause.

¹¹⁹ Belgium: Trib. civ. Bruxelles (July 4, 1913) KOSTERS-BELLEMAN 218.

¹²⁰ France: Cour Paris (May 14, 1902) 14 Z.int.R. (1904) 100 (separation in Chile); App. Amiens (March 21, 1906) Clunet 1906, 1138; App. Grenoble (May 23, 1924) Revue 1924, 222; Cass. (civ.) (July 6, 1922) Clunet 1922, 714 (Ferrari case no. 1); Cour Paris (July 11, 1930) Revue 1930, 680. Trib. civ. Seine (July 15, 1935) Nouv. Revue 1935, 553; Cour Paris (Feb. 4, 1937) Clunet 1937, 283 (decree of the Italian Consular Tribunal in Alexandria on the basis of Italian law) — all concerning Italian mutual agreements. Cf. LEREBOURS-PIGEONNIÈRE 401 § 339a, against BARTIN, 1 Principes 424 § 171; cf. BARTIN, 2 Principes 328 § 319.

Of another character is the Argentine separation of a Chilean man and a French woman in the case of Trib. civ. Seine (Dec. 13, 1898) Clunet 1921 (*sic*), 215.

¹²¹ Hungarian law applied for the province of Burgenland by the Austrian Supreme Court (April 25, 1925) 37 Z.int.R. (1927) 393 in the matter of an Austrian mutual agreement of separation from bed and board.

¹²² Hague Convention on Divorce, art. 5.

¹²³ See *supra* p. 433, n. 187.

It is said that, if the marriage has been recorded, registration of divorce is possible but not essential, except under the Ukrainian Family Law of May 31, 1926, which recognizes only registered marriages and divorces, and under the White Russian Code (art. 23), if a factual marriage has been judicially established.¹²⁴ The Family Protection Law of June 27, 1936 (art. 27) orders the registrars to summon the parties to appear at the registrar's office but does not change the divorce law.¹²⁵

Whether these various forms can be recognized has been a much discussed question, especially in Germany. The German Reichsgericht finally established the view that all Russian types of divorce may be recognized in application to non-Germans domiciled in Soviet Russia¹²⁶ but that the forms now in use whereby the private dissolution of marriage is not declared by any sort of decree, though possibly registered, are unable to affect the marriage of a German spouse.¹²⁷ For Russian nationals domiciled and divorced in Russia, recognition seems to be unquestioned everywhere; thus, a seemingly absolute rejection of Russian divorces in Italy,¹²⁸ for instance, cannot be taken literally. But Russian divorces, which may be recognized in Switzerland,¹²⁹ have been refused recog-

¹²⁴ This seems to be the thesis of MAURACH, 3 *Z.osteurop.R.* (1936) 100, 106. I do not assume any responsibility as to the statements on Soviet law.

¹²⁵ See WERTHER, 4 *Z.osteurop.R.* (1938) 437: the official *Sovetskaja Justicija* warned that art. 18 of the Family Law remained in force.

¹²⁶ RG. (April 4, 1928) 121 RGZ. 24; RG. (Feb. 28, 1938) 92 *Seuff. Arch.* 244, JW. 1938, 1518; and the unanimous opinion of writers; see FREUND, JW. 1928, 880.

¹²⁷ Leading case: RG. (April 22, 1932) 136 RGZ. 142, 146; see also the decision of Feb. 28, 1938 cited in the preceding note. A Russian divorce decree before 1926, involving Germans, was recognized in the decision of the RG. (April 4, 1928) 121 RGZ. 24, assuming that the wife's adultery which under Russian law was not to be stated in the Russian decree, was the real cause of the divorce, and this was a sufficient ground under German law, though irrelevant under the Russian; this method is no longer applicable to Russian divorces without decree.

¹²⁸ App. Milano (June 30, 1927) 19 *Rivista* (1927) 575; cf. FEDOZZI 472ff.

¹²⁹ Switzerland: Just. Dep., BBl. 1928, II 310 no. 17; a unilateral divorce by declaration of one spouse is excepted as offending public policy by BECK, NAG. 391 no. 197.

nition with respect to their own nationals in Poland.¹³⁰ Opinions in England are in conflict; the thesis of Cheshire that consistency demands recognition of any Russian divorce form with respect to a married couple in Russia, irrespective of the nationality of the parties or the place of celebration,¹³¹ results in a perfect parallel to the doctrine of the Reichsgericht, nationality being replaced by domicile. It is doubtful, however, whether a court in America would make use of such a doctrine. Since in this country the domicile of one party is deemed to support jurisdiction for divorce, analogy would result in recognizing a Russian divorce where one party is domiciled in Soviet Russia and the other in the United States. For the purposes of immigration, the State Department recognizes such a divorce.¹³²

Recent Soviet legislation. According to newspaper notices, the Soviet laws concerning marriage and divorce were radically modified in the summer of 1944. Unfortunately, at the time of publication, precise knowledge of this legislation was not available.

(e) The same principles that applied in Germany to Russian divorce procedures have prevailed in German courts and probably elsewhere, with respect to the arbitrary repudiation of a marriage by the husband under old patriarchal regimes, such as the Jewish, the Egyptian, or the former Turkish law. True, it would be intolerable for a foreign husband to be allowed to send his bill of divorce to his wife from a place

¹³⁰ Poland: Supreme Court (Feb. 5, 1931) 6 Z.f.Ostrecht (1932) 383. With respect to Latvia see the note in 1 Z.osteurop.R. (1934-1935) 82.

¹³¹ CHESHIRE 365. For the actual British cases see *infra* n. 134.

KEITH in DICEY, Append. 939 and in 16 Bell Yard (1935) 10-12, *supra* n. 117, seems to reject Russian divorce of an "English marriage" because they lack a proceeding of judicial character. FALCONBRIDGE, Annotation [1932] 4 D. L. R. 50 suggests recognition of mutual agreements in the country of common domicile but non-recognition of any decree without due notice to the defendant and a fortiori of a unilaterally registered divorce declaration. MAKAROV, Précis 404 recommends recognition of registered and judicial unilateral divorces but not of non-registered divorces of Soviet citizens.

¹³² HACKWORTH, 2 Digest of International Law (1941) 383.

within the forum.¹³³ But there is nothing to affect the territory of the forum where a customary right to divorce is exercised abroad and both parties are members of the same creed and nationality which permit such dissolution.¹³⁴ A court, however, may feel interested in the wife's right, if she is or was until the marriage, a subject of the forum.¹³⁵

4. Jurisdiction¹³⁶ and Procedure of the Divorce Court

(a) *Exclusive jurisdiction.* No foreign divorce decree is recognized when exclusive jurisdiction is claimed at the forum where recognition is sought. This is the case in England, Argentina, etc., if the matrimonial domicile is located within the forum, in Hungary, Czechoslovakia, Poland, etc., with

¹³³ LG. Berlin (Oct. 19, 1937) JW. 1938, 2402, cf. *supra* p. 418, n. 115.

¹³⁴ Case of Helene Böhlau, a noted writer, who had married a Mohammedan, LG. München (Sept. 28, 1904) 14 Z.int.R. (1904) 585; OLG. München (March 24, 1905) 16 *ibid.* (1906) 38; Bay. OLG. (Sept. 29, 1905) 16 *ibid.* (1906) 286; OLG. München (Nov. 22, 1909) 20 *ibid.* (1910) 529, Clunet, 1906, 1173. See also LG. Dresden (Dec. 22, 1931) IPRspr. 1932, no. 72 (Egyptian repudiation).

The British cases *Spivack v. Spivack* (1930) 46 T. L. R. 243 and *Sasson v. Sasson* [1924] A. C. 1007, although distinguishable by some particularities, are arguments for an analogous doctrine; see CHESHIRE 365-367. On the problematic case of *Rex v. Superintendent Registrar of Marriages, Hammersmith, ex parte Mir-Anwaruddin* [1917] 1 K. B. 634, 642, see CHESHIRE 363-368; FOSTER, "Some Defects in the English Rules of Conflict of Laws," 16 Brit. Year Book Int. Law (1935) 91; KEITH, 16 Bell Yard (1935) 10, *supra* n. 117.

¹³⁵ OLG. Dresden (Jan. 18, 1927) StAZ. 1927, 219 and AG. Dresden (Oct. 6, 1930) IPRspr. 1931, no. 150 (former German nationality of the wife) refused recognition of Egyptian or Turkish tribunals. Where one spouse is a German national, the RG. now requires a foreign "judgment" according to BGB. § 1564, RG. (April 4, 1928) 121 RGZ. 24; RG. (April 22, 1932) 136 RGZ. 142 (on Russian divorces *supra* n. 127). The Böhlau case, *supra* n. 134, and that of OLG. Dresden (Jan. 18, 1927) IPRspr. 1926-27, no. 10 would probably be decided by non-recognition nowadays.

¹³⁶ On the subject of jurisdiction with respect to foreign judgments in general, comparative studies have been undertaken by LORENZEN, "The Enforcement of American Judgments Abroad," 29 Yale L. J. (1919) 188, 268; YNTEMA, "L'exécution internationale des sentences arbitrales," 2 Mémoires de l'Académie Internationale de Droit Comparé, part 3, 348 and "The Enforcement of Foreign Judgments in Anglo-American Law," 33 Mich. L. Rev. (1935) 1129; NUSSBAUM, D.IPR. 161ff., 441 and his *Principles* 229ff.; GUTTERIDGE, "Le conflit des lois de compétence judiciaire dans les actions personnelles," 44 Recueil 1933 II 111. As to the special field of recognition of divorce decrees, see the conclusions of VREELAND's book, *Validity of Foreign Divorces* 326ff.

respect to nationals of these countries,¹³⁷ and in many countries, if the parties are domiciled in and nationals of such countries.

(b) *International jurisdiction*.¹³⁸ Despite the many confusing differences relating to the jurisdictional requirements of recognition in the enactments and doctrines of the world, there is one condition universally observed, viz., that the court of judgment must have had jurisdiction in the international sense, i.e., according to the conceptions of the forum where recognition is sought. A better considered formula demands only that courts of the state of judgment, not just the court of the instant case, be competent in the eyes of the law of the forum.

The most firmly established ground for defense to a foreign decree in this country is that neither party was domiciled at the divorce forum.¹³⁹ This, in general, or even the absence of the matrimonial domicil,¹⁴⁰ is a defense everywhere,¹⁴¹ with the important exception, however, that under the na-

¹³⁷ *Supra* p. 398; see for Austria OGH. (Feb. 26, 1935) Oest. Anwalts Zeitung 1935, 297, 8 Jahrb. H. E. (1936) no. 1563.

¹³⁸ On the conception see NEUNER, *Internationale Zuständigkeit* (1929) and in 13 *Annuario Dir. Comp.* (1938) part 1, 349.

¹³⁹ Restatement § 111.1. See 1 BEALE § 111.1. For decisions invalidating for this reason Mexican divorces see Note 143 A. L. R. 1313ff.

¹⁴⁰ Apart from the English and Argentine materials, see, for the Brazilian practice under the former law, Sup. Trib. Fed. (Oct. 6, 1906) 2 *Revista dir. civ.* (1906) 373 (a Portuguese court was incompetent to render a divorce, the defendant husband being domiciled in the Federal District of Brazil). In the case Sup. Trib. Fed. (July 24, 1920) 64 *Revista dir. civ.* (1922) 505, the husband was both domiciled and naturalized in Brazil.

¹⁴¹ See for instance German C. Civ. Proc. § 328 par. 1 in connection with § 606 par. 1; France: Seine (April 11, 1935) mentioned by BATES, "The Divorce of Americans in France," 2 *Law and Cont. Probl.* (1935) 322 at 325 n. 10 (Reno decree, neither party residing in Nevada).

Both this rule and the American principle were egregiously ignored by OLG. Hamburg (Oct. 1, 1935) JW. 1935, 3488 and its critics, JONAS, JW. 1936, 283 and LORENZ, 6 *Giur. Comp. DIP.* 322 no. 253, discussing a strange "new way" believed necessary by the court to justify not recognizing a frivolous Mexican divorce granted the husband, an American domiciled in New Jersey, against his wife, who had been formerly and afterwards became a German national but was an American at the time of the decree.

Switzerland: NAG. art. 78 par. 3; a divorce of a Swiss domiciled in the United States is recognized if rendered by the judge of the domicil but not if rendered in Mexico, Just. Dept., BBL. 1938, II 499 no. 9.

tionality principle divorce may be decreed by the national state without the fulfillment of domiciliary requirements.¹⁴² This is the foremost consideration in the struggle against the "divorce mills," but it also has a much less desirable effect on the various cases where the wife is considered by the divorce court to have a separate domicile but is not so considered in the forum where recognition is sought.¹⁴³

(c) *International treaties*. A remarkable advance has been conceded to the principle of domicile in recent international treaties. The *Código Bustamante* (art. 52) proclaimed international jurisdiction for divorce to be at the matrimonial domicile, in contrast with the general policy of the Convention not to specify the personal law (art. 7) and despite the protest of Brazil, which then followed the nationality principle.¹⁴⁴ The Franco-Italian Treaty of June 3, 1930, on the enforcement of judgments (art. 11, par. 1) secured recognition for the decisions of the court of the domicile or, in their

¹⁴² France: Cass. (req.) (April 29, 1931) S.1931.1.247.

Germany: Code of Civ. Proc. § 606 par. 2.

Brazil: S. Ct. (Jan. 31, 1933) 21 Rev. Jur. Bras. (1933) 26.

English courts generally are not supposed to recognize such jurisdiction. They have recently been said, however, to give effect to a decree rendered by a court of competent jurisdiction dealing with its own nationals, both of whom had agreed to submit their dispute to that tribunal "as a clear, final and binding decision upon all the world." See *Mezger v. Mezger* [1937] P. 19 at 28 per Langton, J. This would mean that the parties can dispose of the question of jurisdiction.

¹⁴³ There is a line of decisions rejecting American decrees for this reason in Canada: see *Thompson v. Crawford* [1932] 2 D. L. R. 466 (Ont. 1932), aff'd [1932] 4 D. L. R. 206, 41 O. W. N. 231 (Nevada decree with consent of the husband), cf. *FALCONBRIDGE*, 1 *Giur. Comp. DIP.* 37; *Wyllie v. Martin* (1931) 44 B. C. 486, [1931] 3 W. W. R. 465 (California decree); *MacDonald v. Nash* [1929] 4 D. L. R. 1051 (Manitoba court did not recognize the Nevada decree); *Gilbert v. Standard Trusts Co.* [1928] 4 D. L. R. 371.

Italy: App. Trieste (July 19, 1933) 25 *Rivista* (1933) 469 and citations (on the occasion of a Swiss annulment of marriage).

Belgium: *supra* p. 407, n. 71.

¹⁴⁴ See Reservation of the Delegation of Brazil in signing the Treaty of Habana, and the law enforcing the treaty, *Diario Off.* (Jan. 11, 1929); see also ESPINOLA's letter to the Conference of Habana of January 27, 1928, and the full statement by ESPINOLA, printed with the judgment of the Federal Supreme Tribunal May 14, 1937, App. Civ. no. 6831, 26 *Rev. de Crítica Judiciaria* 361, 364.

absence, decisions at the residence of the defendant, without excepting status matters, and the same devices have been adopted in other European treaties,¹⁴⁵ despite the fact that all the countries involved are traditional followers of the nationality principle.

(d) *Opportunity for defense.* Due notice of the divorce suit, whether considered an independent requirement or a requisite of jurisdiction is often qualified to exclude service by publication, as was done until 1942 in a minority of states of the United States.¹⁴⁶ It is not a new experience that "every country claims for its own courts wider extraterritorial authority than it concedes in return to foreign tribunals."¹⁴⁷ This position is also taken in countries which allow service by publication in their own rules of procedure.

Lack of due notice may be cured, according to many rules, by the personal appearance of the defendant. But it is the second most used ground of defense to a foreign divorce decree rendered by an ill-reputed court. Another typical case is that in which the husband in suing abroad causes the notice to be sent to a false address of the wife to impair her defense; this case has also been handled in the category of fraud or public policy.¹⁴⁸

¹⁴⁵ 153 League of Nations Treaty Series (1934) 135, 141. It is interesting to see how vigorously the Italian Supreme Court, leading the judicature of the country of Mancini, in interpreting the Italian Treaty of April 6, 1922 with Czechoslovakia, emphasizes the importance of the husband's domicile for jurisdiction in matrimonial causes; Cass. (April 26, 1939) *Giur. Ital.* 1939, I, 1, 879, affirming App. Roma (July 19, 1938) *Foro Ital.* 1938, 1, 1314, *Giur. Ital.* 1938, I, 2, 452, *Clunet* 1939, 177.

¹⁴⁶ VREELAND 328 enumerates with some doubts: District of Columbia, Massachusetts, Montana, New York, North Carolina, North Dakota, Pennsylvania, South Carolina, South Dakota, Vermont, Wyoming.

¹⁴⁷ Cave, J. in *Heinemann & Co. v. Hale & Co.* [1891] 2 Q. B. (C. A.) 83, 87; cf. YNTEMA, *supra* n. 136, at 396.

¹⁴⁸ Drastic illustrations:

England: *Rudd v. Rudd* [1924] P. 72 rejects a decree of the state of Washington of the United States, the plaintiff husband having mailed a copy of his application to an English address where his wife had never lived, and by advertising the suit in a Seattle newspaper which she never read.

Other particulars of the proceedings of the judgment court are not re-examined as a general rule,¹⁴⁹ except under the French system of unlimited control. But when the defense is believed to have been obstructed, for instance with respect to evidence,¹⁵⁰ some way is usually found to protect the offended interest; modern regulations contain express clauses for this purpose.¹⁵¹ It may be quoted, incidentally, that the Federal Supreme Court of Mexico has, in repeated decisions, declared divorce statutes of such states as Yucatan and Champecha unconstitutional on the ground that they impair the right of defense.¹⁵²

Switzerland: BG. (May 13, 1938) 64 BGE. II 74, 79 refused recognition to a Spanish divorce because the husband, knowing that his wife lived in Switzerland, did not notify her of the proceedings; in this case not even the judgment was served on her.

Canada: Delaporte v. Delaporte [1927] 4 D. L. R. 933, 61 Ont. L. R. 302.

France: Cass. (req.) (Nov. 11, 1908) S.1909.1.572, Revue 1909, 227 (United States decree; the husband had falsely pretended not to know the wife's residence). See also *infra* n. 150.

¹⁴⁹ England: In Crowe v. Crowe (1937) 157 L. T. R. 557, [1937] 2 All E. R. 723 it is expressly stated that the defense based on fraud, as authorized in Bater v. Bater [1906] P. 209, is limited to fraud in affecting jurisdictional facts.

¹⁵⁰ The United States: In Bethune v. Bethune (1936) 192 Ark. 811, 94 S. W. (2d) 1043 a Mexican decree was refused recognition on several grounds among which insufficient evidence is mentioned.

Belgium: Trib. civ. Antwerp (June 19, 1931) Clunet 1932, 1104 (fraudulent statements to make the defense impossible).

France: Trib. civ. Seine (June 3, 1938) Clunet 1939, 87 and (June 29, 1938) Clunet 1939, 61 (both regarding Mexican decrees and fraudulent manoeuvres of the husband to impair the defense of the wife).

In the Argentine case, Cám. civ. 2 de la Plata (Nov. 21, 1939) 68 J. A. 577 a Mexican decree was rejected because no contact whatever with the divorce state existed.

¹⁵¹ Hague Convention on Divorce, art. 8 and all recent treaties on enforcement of judgments.

German C. Civ. Proc. § 328 par. 2, etc.

In France "freedom of defense" is always considered an essential and in some decisions indicated as flowing from natural justice, quite as in England; see PERROUD, 5 Répert. 377 no. 118.

¹⁵² See S. Ct. (May 9, 1934) 41 Seman. Jud. part 1, 191; S. Ct. (May 12, 1936) 48 *ibid.* part 2, 2290; S. Ct. (July 8, 1933) 38 *ibid.* part 2, 1442; S. Ct. (Nov. 29, 1933) 39 *ibid.* part 3, 2547.

On the American reaction to Mexican divorces see HACKWORTH, 2 Digest of International Law (1941) 384.

5. Anti-Divorce Policy of the Forum

(a) *Nationals of the forum.* If absolute divorce is forbidden by the municipal law of a country, it is perfectly understandable under the principle of nationality that the subjects of the forum are also prohibited from divorcing abroad. This interpretation seems obvious to the Italian courts, which will not recognize a foreign absolute divorce where both, or even only one, of the parties have been of Italian nationality.¹⁵³ The same point of view obtains in Spain¹⁵⁴ and was held in France before divorce was reestablished in 1884.¹⁵⁵ All the recent French divorces of Italians, like that in the *Ferrari* case, are naturally regarded as invalid in Italy and have been criticized in France also, precisely because they are inconsistent with former practice as well as with the fraud theory of the French courts.¹⁵⁶

But this attitude is not the only one possible. In Brazil the matter is in doubt and has formed the subject of the most diverse decisions involving the submission of foreign divorce decrees for *homologação*, i.e., confirmation for the purpose of enforcement. Some authorities had considered a foreign divorce as capable of full recognition in case the wife was of Brazilian nationality, the personal law of the husband being decisive for status questions.¹⁵⁷ The prevailing opinion, however, held for a long time by a majority of the Federal Su-

¹⁵³ Cass. Torino (June 6, 1919) *Revue* 1920, 498; Cass. Roma (Nov. 13, 1919) *Revue* 1920, 498; App. Milano (Dec. 7, 1916) *Clunet* 1918, 312; App. Milano (March 3, 1921) *Monitore* 1921, 500; *Clunet* 1922, 194; App. Firenze (March 10, 1923) *Monitore* 1923, 401, *Clunet* 1923, 1021, App. Genova (Feb. 28, 1938) *Rivista* 1939, 331, *Clunet* 1939, 171 (English divorce of two Italians having married in England).

¹⁵⁴ Unanimous opinion, see MANRESA, 1 *Comentarios al Código Civil Español* 99; INGLOTT, 115 *Revista Gen. Legisl. y Jur.* (1909) 258, 288.

¹⁵⁵ Cass. (civ.) (Feb. 28, 1860) S.1860.1.210.

¹⁵⁶ See *supra* p. 443.

¹⁵⁷ See RODRIGO OCTAVIO, *Le droit international privé dans la législation brésilienne* no. 61; BEVILAQUA 322 n. 19 and in 6 *Répert.* 167 no. 41. Where the husband was of Brazilian nationality and domicil, the Sup. Trib. Fed. (July 24, 1920) 64 *Revista dir. civ.* (1922) 505 spoke of lack of jurisdiction of the Portuguese court.

preme Court and adopted by Rodrigo Octavio when he joined the Court,¹⁵⁸ was that the foreign husband may remarry abroad, but that *homologação* with respect to effects of divorce in Brazil is to be limited to property effects which a Brazilian judicial separation can also produce. Such partial enforcement was also granted when both parties were of Brazilian nationality.¹⁵⁹ The new law of 1942, despite its principle of domicile, provides that a foreign divorce of two Brazilian parties is not recognized; if one of them is a Brazilian, the divorce is recognized with respect to the other who, however, may not remarry in Brazil.¹⁶⁰ This provision seems to place husband and wife on an equal footing; it probably does not interfere with the enforcement of property effects.¹⁶¹

Still another solution was given by a surprisingly liberal construction of the Austrian prohibition of absolute divorce for Roman Catholics. In its last thirty years, the Austrian Supreme Court admitted that, if one spouse¹⁶² was a foreigner at the time of the marriage or even only at the time of suit, a foreign divorce not only had full effect for him but also freed the other party, although the latter was of Austrian nationality and Catholic religion.¹⁶³

Courts of third countries facing such contrasts between the law of the divorce court and the personal law have sometimes felt themselves to be in a dilemma; some have recognized a

¹⁵⁸ Sup. Trib. Fed. (Aug. 28, 1929) no. 860, Clunet 1932, 1111; the opinion of RODRIGO OCTAVIO is also published in 11 Arch. Jud. Suppl. (1929) 197. See ten other decisions (1913-1933) in GUIMARÃES, 11 Brasil-Acordãos 167 no. 29.229, particularly that of Sup. Trib. Fed. (Nov. 4, 1916) also in Clunet 1919, 402.

¹⁵⁹ In this sense, the most general opinion is summarized in the decision of the App. Div. of the Distr. Fed. Court no. 4830 (Jan. 29, 1935) 115 Revista dir. civ. (1935) 155, Clunet 1936, 975. Sup. Trib. Fed. (July 1, 1942) no. 1.032, 64 Arch. Jud. (1942) 194.

¹⁶⁰ Lei de Introdução art. 7 § 6; ESPINOLA, 8-B Tratado 1067.

¹⁶¹ ESPINOLA, 8-B Tratado 1067 no. 3, however, declares that in the case of two Brazilian spouses foreign divorce will not be recognized for any effect.

¹⁶² Divorce of two Catholic Austrian spouses, of course, was not recognized, OGH. (Nov. 6, 1934) Oest. Anwalts Zeitung 1935, 15, 8 Jahrb. H. E. (1936) No. 619.

¹⁶³ *Infra* notes 224, 225.

divorce irrespective of the public order of the national law, where their own public policy was not offended.¹⁶⁴ But actually courts generally follow their own principle on status questions. An Italian national who has obtained a divorce in the United States is not allowed to remarry in France, Germany, Cuba, or any other country following the nationality rule.¹⁶⁵ Under the Swedish statute, however, the exception obtains that, if a party's marriage has been dissolved in one country and he is prohibited from remarrying under another foreign law, i.e., his personal law, his second marriage should not be annulled on this ground.¹⁶⁶

(b) *Marriage celebrated within the forum.* The Argentine Civil Marriage Law¹⁶⁷ declares that a party to an Argentine marriage cannot remarry after a foreign absolute divorce. The prevailing, though contested, interpretation considers the foreign dissolution of a marriage celebrated in Argentina invalid¹⁶⁸ and the foreign dissolution of a foreign marriage valid, even to the extent that the parties may remarry in Argentina. Consistently with the principle of domicile, no distinction is drawn according to the nationality of the parties.

The situation is still more striking with respect to the Treaty of Montevideo on civil international law, which expressly forbids the dissolution of a marriage celebrated in a country not permitting divorce (i.e., a participant state).¹⁶⁹ The courts of Uruguay feel authorized, by the clause of the Final Protocol reserving public policy, to pronounce divorces of Argentine nationals domiciled in Uruguay without any regard to

¹⁶⁴ See, for instance, Trib. Seine (Nov. 18, 1901) Clunet 1902, 103.

¹⁶⁵ Cf. RAAPE 424; differently 3 FRANKENSTEIN 100, 563.

¹⁶⁶ Swedish Marriage Law of 1904, c. 2 § 2.

¹⁶⁷ Art. 7.

¹⁶⁸ See *supra* p. 432, n. 178.

¹⁶⁹ The courts are decided on this point; see ROMERO DEL PRADO, Der. Int. Priv. 319; 2 VICO 87, and recently Cám. civ. 2 de la Cap. (Dec. 30, 1940) 21 La Ley 440 (marriage celebrated in Delaware, U. S., dissolved in Montevideo) with dicta for the case of marriages celebrated in a country where divorce is prohibited.

the place of celebration of the marriage.¹⁷⁰ In Argentina, while there remains some doubt about the Civil Code, there can be none concerning the express provision of the treaty (art. 13), requiring that the law of the place where the marriage was celebrated must concur with the law of the matrimonial domicile in permitting a divorce. This provision inserted in favor of Argentine law leaves the Argentine courts no choice in refusing recognition to Uruguayan divorces of parties married in Argentina.¹⁷¹ A second marriage celebrated in Uruguay is considered null,¹⁷² i.e., as either adultery or concubinage with appropriate effects,¹⁷³ the children illegitimate,¹⁷⁴ the wife unable to obtain maintenance or, after dissolution of the second marriage, alimony.¹⁷⁵ All this construed under the sanction of an international treaty sounds strange.¹⁷⁶

Under the new draft of the Montevideo Treaty, third member states are to recognize any divorce rendered at the marital domicile; this, of course, restores the full impact of the domiciliary principle, which is otherwise considerably restricted by the present treaty.¹⁷⁷

In Chile, the matter is covered by three sections not quite consistent, from which it has been concluded that persons

¹⁷⁰ For a recent example see Ap. Montevideo (Feb. 19, 1941) 39 Rev. Der. Juris. Adm. 82. Opinion of CALANDRELLI cited and approved by Cám. civ. 2 de la Cap. (Dec. 30, 1940), *supra* n. 169.

¹⁷¹ Recent surveys on the attitude of the Argentine courts: 5 Boletín del Instituto de Enseñanza Práctica de la Facultad de Buenos Aires (1939) 199; Note in 39 Rev. Der. Juris. Adm. (1941) 82.

¹⁷² Cám. civ. 2 de la Cap. (May 8, 1931) 35 Jur. Arg. 941; (Nov. 14, 1932) 101 Gac. del Foro 100; Cám. civ. 1 de la Cap. (Sept. 12, 1932) 39 Jur. Arg. 371 and (Feb. 19, 1934) 45 *ibid.* 270; and after others (Oct. 24, 1938) 35 Jur. Arg. 941.

¹⁷³ Cám. civ. 1 de la Cap. (Sept. 12, 1932) 39 Jur. Arg. 371-408; Cám. civ. 2 de la Cap. (Nov. 14, 1932) 101 Gac. del Foro 100.

¹⁷⁴ 2 VICO 81 no. 109b.

¹⁷⁵ Ap. Buenos Aires (March 14, 1935) Revista del Foro (Peru) 1935, 952, 954; Clunet 1937, 124.

¹⁷⁶ 2 VICO 84. Yet the new draft, art. 15, changes nothing in this particular, except that the Argentine courts will not be explicitly compelled by the wording of the treaty to maintain the prevailing interpretation of art. 7 of their Civil Marriage Law.

¹⁷⁷ Treaty on international civil law, draft of 1940, arts. 15 and 59.

married in Chile, whether Chileans or foreigners, if divorced abroad, may not remarry in Chile, although their foreign remarriage would be recognized.¹⁷⁸

(c) *Foreigners*. Divorce of foreigners by a foreign decree has usually been recognized despite a municipal law hostile to divorce, although often after some hesitancy. The forum is considered not really interested in the status of foreigners.¹⁷⁹ Moreover, a foreign divorce has been regarded as creating vested rights.¹⁸⁰

The French Supreme Court, at the time when divorce was forbidden in France, held that a foreign divorcée could marry a Frenchman in the country.¹⁸¹ Along the same line of thinking, Italian courts, after having been divided on the question for a long time, are now prepared to grant a decree of exequatur for foreign divorce decrees concerning non-Italian parties, including former Italian nationals,¹⁸² and do not object to the remarriage of such parties in Italy.¹⁸³ This liberal attitude suffers an exception, if any, only in the case of a marriage celebrated in Italy in accordance with a canonical ceremony and with civil effects,¹⁸⁴ for such a marriage is exclusively subjected to the ecclesiastical tribunals and there-

¹⁷⁸ Chile, C. C. arts. 120, 121; Ley de Matrimonio Civil, art. 15. See VELOSO CHÁVEZ, *Derecho Internacional Privado* (1931) 117, 118.

¹⁷⁹ See QUADRI, 3 *Giur. Comp. DIP.* no. 32.

¹⁸⁰ Cf. e.g., NIBOYET, *Revue Crit.* 1936, 130; ZULETA (Colombian), *Comisión de Reforma del Código Civil* (1939-1940) 96; SOTO, *ibid.* 233.

¹⁸¹ French Cass. (civ.) (Feb. 28, 1860) D.1860.1.57, S.1861.1.210; cf. Cour Orléans (April 19, 1860) D.1860.2.82 (same case); Cass. (civ.) (July 15, 1878) D.1878.1.340, Clunet 1878, 499. For justification see 3 ARMINJON 44; suggesting that the most practical and also most equitable solution is not to question what has been done in the domain of another system.

¹⁸² See *infra* n. 221.

¹⁸³ App. Roma (Oct. 29, 1884) Clunet 1886, 620; App. Milano (Nov. 29, 1887) Clunet 1889, 168; Cass. Torino (Aug. 1, 1922) Clunet 1923, 391; Cass. (April 8, 1931) Foro Ital. 1931, I, 546, Clunet 1932, 222; App. Milano (April 23, 1931) Clunet 1932, 519 (Hungarians divorced in Hungary).

¹⁸⁴ A pure ecclesiastical ceremony does not count here because it is of no effect under Italian law.

fore susceptible only of annulment and separation from bed and board.¹⁸⁵

While in Italy a canonical ceremony is always voluntary, since a secular form also exists, in Spain every marriage of Catholics pertains to the Church.¹⁸⁶ But even an American citizen, not a Catholic, married in Spain and divorced anywhere, is considered unable under Spanish law to remarry in Spain.¹⁸⁷ Likewise, the Polish Supreme Court held that, under the applicable Polish law, an American citizen of Catholic faith who had been married and divorced in the United States could not remarry in the former Austrian and Russian part of Poland.¹⁸⁸

Particular rigor obtained in Brazil, as the courts, despite their former nationality principle, generally denied recognition to foreign divorces not only of Brazilian nationals but also of foreigners domiciled in Brazil.¹⁸⁹ This policy may find even more support under the new law.

(d) *Bigamy*. It must be noted that nonrecognition in the

¹⁸⁵ App. Milano (Dec. 27, 1938) Foro Ital. 1939, I, 1216, Clunet 1939, 763, 19 Rivista (1940) 99, on the basis of Cass. (June 11, 1934) Foro Ital. 1934, I, 1062. *Contra*: App. Brescia (Nov. 9, 1938) Foro Ital. 1939, I, 1222, Clunet 1939, 763; and App. Brescia (Oct. 27, 1938) Rivista 1939, 407. Cf. Bosco, 25 Rivista (1933) 38.

¹⁸⁶ Spanish C. C. arts. 42, 75 ff.; Trib. Supr. (March 31, 1911) Revue 1914, 635.

¹⁸⁷ In the prevailing opinion, the law of Spain is identified with Canon Law to the extent that, on principle, no divorce *a vinculo* is either granted or recognized, even to non-Catholics, despite their national law permitting it. Trib. Supr. (March 31, 1911) Revue 1914, 635; LASALLA LLANAS 139; TRÍAS DE BES, Estudios de derecho internacional privado 429 n. 2 and Der. Int. Priv. no. 143. It is no true exception that a foreign civil marriage of Catholics may be divorced abroad; the marriage itself is invalid in the eyes of Canon Law; See COVIAN, Art. Divorce in 12 Enciclopedia Jur. Esp. 446, 448. For other literature, cf. SERIN, Les conflits de lois dans les rapports franco-espagnols en matière de mariage, de divorce and de séparation de corps (1929) 87.

In Brazil to the same effect Ct. App. Civ. Rio de Janeiro (Oct. 2, 1919) 55 Revista dir. civ. (1920) 523, Clunet 1921, 990; but see *supra* n. 159.

¹⁸⁸ Polish S. Ct. (Dec. 17, 1936) 4 Z. osteurop. R. (1937) 47.

¹⁸⁹ The principle has been stated, although breaking it by majority vote by a very cautiously framed exception, in the decision of the Sup. Trib. Fed. no. 993 (July 17, 1940) 58 Arch. Jud. 83 on the ground of jurisdictional considerations that may be questioned.

cases discussed under (a) and (c) *supra* does not mean that remarriage following the divorce is bigamous in the criminal sense. Even the Spanish Supreme Court, after having declared invalid a German divorce of a German national who had undergone a Catholic marriage ceremony in Spain, refused to consider his remarriage bigamous because in accordance with his national law he could well think his action justified.¹⁹⁰ As the Treaty of Montevideo has been understood¹⁹¹ and as its new draft expressly states,¹⁹² entering upon a second marriage after divorce at the matrimonial domicile does not constitute bigamy under any law in the member states, including Argentina.

6. Requirement of Similar Grounds

(a) In most states of the United States, at English common law,¹⁹³ and in many other countries, it is immaterial whether the ground upon which a foreign divorce is based is adequate under the law of the forum too.

(b) In a number of jurisdictions, however, domiciliaries or nationals, as the status principle may be, are protected against foreign divorce decisions, unless there is agreement with the divorce grounds established by the *lex fori*.

An important example is given by the New York courts, whose traditional policy so far has been to refuse to recognize

¹⁹⁰ Trib. Sup. (April 7, 1915) 12 Revista Der. Jur. y Ciencias Soc. (Chile) (1915) part 3, 9, Clunet 1917, 732, Revue 1919, 611 (the divorce in the case was invalidated by Trib. Sup. (March 31, 1911) Revue 1914, 635, cited *supra* n. p. 501, n. 187).

¹⁹¹ Argentina: Cám. crim. de la Cap. (July 1, 1932) 38 J. A. 1237. See also 2 VICO 81 no. 109a.

¹⁹² (1940) art. 15b.

¹⁹³ The doubt whether the *lex domicilii* abroad could also govern the case of an English marriage was removed by Harvey v. Farnie [1882-1883] 8 App. Cas. 43; Pemberton v. Hughes [1899] 1 Ch. 781; Bater v. Bater [1906] P. 209 by Sir Gorell Barnes at 217; the principle was recently confirmed by Mezger v. Mezger [1936] 3 All E. R. 130, [1937] P. 19 (conduct short of adultery under § 1568 German C. C.).

Similarly, Canada: Leigh v. Leigh (Ont. Ct. App.) [1937] 1 D. L. R. 773 (Michigan decree on the ground of desertion to Canadian residence).

Greece: 6 Répert. 430 no. 98.

any decree of divorce obtained "upon grounds insufficient for that purpose in this state, when the divorced defendant resides in this state and was not personally served with process and did not appear in the action."¹⁹⁴ The last limitation, of course, was necessitated by the Full Faith and Credit Clause of the Constitution but also seems to be in accord with *Gould v. Gould*,¹⁹⁵ dealing with a French decree. This practice evidently is affected by *Williams v. North Carolina*.

British subjects, domiciled in England or Scotland but living in India or certain other British possessions, may obtain divorce in the local courts under the Indian and Colonial Divorce Jurisdiction Act of 1926; among other conditions, the grounds of divorce must be those recognized by English law.¹⁹⁶

An analogous restriction with respect to foreign divorces of their nationals obtains in a number of countries following the nationality principle.¹⁹⁷

¹⁹⁴ *Johnson v. Johnson* (1933) 146 N. Y. Misc. 93, 95, 261 N. Y. Supp. 523, 526; the rule has been steady since *Jackson v. Jackson* (1806) 1 N. Y. (Johns. Cas.) 424; cf. *Beeck v. Beeck* (1925) 211 App. Div. 720, 208 N. Y. Supp. 98.

¹⁹⁵ (1923) 235 N. Y. 14, 138 N. E. 490.

¹⁹⁶ Indian and Colonial Divorce Jurisdiction Act, 1926, 16 & 17 Geo. V, c. 40; 3 & 4 Geo. VI, c. 35: Indian and Colonial Divorce Jurisdiction Act, 1940, 301.

¹⁹⁷ France: Trib. civ. Seine (May 2, 1918) Clunet 1918, 1182 (even with respect to foreigners). Trib. civ. Seine (June 10, 1936) D. H. 1936, 420 (exequatur denied one spouse being of French nationality and the ground for divorce not agreeing with French law). NIBOYET 754 bases the rule on the idea that there is no vested interest.

Greece: Trib. Athens, 47 Thémis 582, Clunet 1937, 597 (Turkish decree).

The Netherlands: H. R. (Nov. 24, 1916) W. 10098; Rb. Rotterdam (June 28, 1935) W. 12991 (South African decree). Does H. R. (April 1, 1938) W. 1938, no. 989, however, give the judge discretion even over status judgments? See VAN DER FLIER, Grotius 1939, 204, 208.

Poland: Law of 1926 on private international law, art. 17 § 3 provides that Polish law must be applied; in more recent practice, however, recognition is denied unless a treaty assures reciprocity, see *supra* p. 398, n. 30.

Portugal: (probably also beyond the domain of the Hague Convention) see CUNHA GONÇALVES, 1 Direito Civil 692 pars. 1 and 2.

Switzerland: BG. (Oct. 10, 1930) 56 BGE. II 335 and (May 13, 1938) 64 BGE. II 76 at 78 (if one of the spouses is a Swiss national and domiciliary,

In Germany, however, it is sufficient that the foreign decree state facts which constitute valid grounds for divorce under German law,¹⁹⁸ although the decree may have been based upon other grounds or no grounds at all or upon mutual agreement. This theory of substitute ground is a concession to a more liberal conception of migratory divorce but gives meager justification for the fortuitous chances of searching in a foreign decree for facts held irrelevant by the foreign court.

(c) A corresponding regard for the legislation of third states is shown by the Swedish law,¹⁹⁹ providing that a divorce decree rendered by a foreign authority may not be recognized, unless a ground for divorce existed under the law of the state whose nationals the parties were.

7. Evasion

(a) *Fictitious change of personal law.* The requirements of similar grounds and also in part of jurisdiction result in a bar to subjects of the forum who seek dissolution of their marriages abroad under easier conditions than they find at home. Indeed, a considerable number of the cases which have been termed evasion from or circumvention of the domestic provisions on divorce are sufficiently dealt with under the heading of exclusive jurisdiction of the forum or lack of international jurisdiction of the divorce court.

the rule of NAG. art. 7g par. 3 that Swiss jurisdiction and law give way to the foreign domicile is inapplicable).

Cuba: Divorce law (Decreto-Ley) 206 of May 10, 1934, art. 58: Foreign divorce judgments between Cubans and foreigners are recognized if the basis of the judgment was equal or analogous to any of the divorce grounds recognized in the above Decreto-Ley 206.

In Peru a similar principle seems indicated by the decision of the Lima court of Oct. 4, 1935, *Revista del Foro* 1935, 913, *Clunet* 1937, 124, recognizing dissolution of a marriage celebrated in Peru between a foreign diplomat and a formerly Peruvian woman, because the divorce was based on grounds recognized in the recent Peruvian C. C.

¹⁹⁸ C. Civ. Proc. § 328 no. 4 in combination with EG. art. 17 par. 4, as interpreted by RG. (April 4, 1928) 121 RGZ. 24.

¹⁹⁹ Law of 1904 with amendments, c. 3 § 5.

(b) *Fictitious change of domicil.* Fictitious change of domicil occurs in the frequent cases where the parties falsely assert that a domicil exists within the divorce forum, as demanded both by the divorce court and the court of recognition. The British ²⁰⁰ and Swiss ²⁰¹ authorities consider collusion or fraud going to the root of the jurisdiction as a defense against recognition. Similarly, all American courts seem to hold that recognition is not due to a divorce obtained under a "residence simulated for this purpose" or not established "bona fide with intention of a permanent domicil."²⁰² This rule has been developed, in contrast to the English doctrine,²⁰³ under the standard of the state where the judgment is rendered and not of the forum of recognition. With respect to divorce decrees, however, the result is hardly distinguishable, and this is true also of the five state statutes and various court practices ²⁰⁴ that contemplate the same factual situation from the angle of the evaded domiciliary law. The Massachusetts and Maine statutes preceded and the statutes of Delaware, New Jersey, and Wisconsin followed and adopted the evasion section of the otherwise ill-fated Uniform Annulment of Marriage and Divorce Act; ²⁰⁵ they deny force to a foreign decree of divorce if, to use the wording of the Delaware statute: ²⁰⁶

"Any inhabitant of this State shall go into another State, territory or country in order to obtain a decree of divorce for a cause which occurred while the parties resided in this State,

²⁰⁰ *Bater v. Bater* [1906] P. 209; *cf. Mezger v. Mezger* [1937] P. 19, *Crowe v. Crowe* (1937) 157 L. T. R. 557.

²⁰¹ BECK, NAG. 359 no. 100 with literature.

²⁰² See cases in 27 C. J. S. (1941) Divorce § 332 n. 11; see also SCHOULER, *Domestic Relations* § 1983, 2101, 1 WHARTON § 228.

²⁰³ See YNTEMA, *supra* n. 136, 387.

²⁰⁴ VREELAND 329 places twelve states in this category.

²⁰⁵ The Uniform State Law was drafted by the Divorce Congress of Philadelphia in November, 1906, and approved by the Commissioners but finally retired by them to be replaced by the draft of a Uniform Divorce Jurisdiction Act of 1930, based on other principles.

²⁰⁶ Del. Rev. C. (1935) § 3525, identical with the model.

or for a cause which is not ground for divorce under the laws of this State."

This text with its twin clauses, however, is puzzling. In the second clause, "inhabitant" clearly means, as it does generally, a domiciliary who has remained domiciled in the state. This case, "or for a cause, etc.," may be fairly well defined by assuming that the parties were in fact continuously domiciled in the state of recognition and that they or the plaintiff fraudulently alleged that they were domiciled in the divorce forum and, furthermore, that the ground upon which the decree was rendered is no cause for divorce in the state. The first case, "cause which occurred, etc.," looks mysterious. "Inhabitant" must have the same meaning as in the second alternative, and this seems to be generally agreed, since the statutes, with the possible exception of New Jersey, are not applied where the parties move to another state for purposes other than to obtain a divorce.²⁰⁷ If, thus, the first case is also concerned with a fictitious foreign domicil, what is left for the second case? For, if all causes that occurred during the residence of the parties in the state are precluded from consideration by the divorce forum, what other cause can practically be in question? Perhaps the draftsmen thought that even a cause which is legally sufficient in both jurisdictions should be averred and decided exclusively by the court at the actual domicil; thus, the first clause would favor the jurisdictional and the second the substantive law of the domicil. But there is no confirmation of such an interpretation to be found anywhere; Vreeland, the sole critic, contents himself with rejecting the entire clause as indefensible on principle.²⁰⁸

²⁰⁷ See 1 WHARTON § 229 for the Massachusetts statute; Note in 7 Minn. L. Rev. (1923) 240 and especially as to and against some mysterious decisions of the New Jersey Supreme Court, Note, 21 Mich. L. Rev. (1923) 922, GOODRICH (ed. 1) § 127 n. 39; VREELAND 135, 330.

²⁰⁸ VREELAND 340. We may presume a connection with the obscure limitations of jurisdiction discussed *supra* p. 454.

It has been held that divorce void under these rules cannot be subject to estoppel.²⁰⁹

(c) *Fictitious change of nationality*. In a less obvious way, change of nationality has also sometimes been termed fictitious and hence regarded as incapable of supporting recognition of a divorce granted under the new national law. For a better understanding, one ought to remember the migratory divorces, typified by the pilgrimages of Americans to Paris, Reno, and Chihuahua. When divorce was forbidden in France, the *Bauffremont-Bibesco* case discussed below was a celebrated example. Austrian Catholics went over the Hungarian border for divorce. Italians, whose law still prevents absolute divorce, emigrated to Fiume to be divorced, so long as that city did not belong to Italy.

The *Bauffremont* case was the cornerstone of a French doctrine of *fraude à la loi*, which, enjoying for a time great prominence, opposed evasion of the law of the forum by agreements, adoptions, and gifts, as well as by divorces and judicial separations, the latter, however, being known as the classic domain of this doctrine.²¹⁰ The princess of Bauffremont, Belgian by birth and French by marriage, changed her citizenship by naturalization in the then independent German state of Saxe-Coburg-Gotha and was there divorced under her new personal law; then she married the Rumanian prince Bibesco. The French Court of Cassation declared the naturalization of the woman, as well as her divorce and remarriage, fraudulent and void, these acts having occurred for the sole purpose of escaping from the prohibitions of the French law.²¹¹ This doctrine has been followed in other French decisions and by Bel-

²⁰⁹ See JACOBS, "Attack on Decrees of Divorce," 34 Mich L. Rev. (1936) 749, 777, n. 127 and n. 128.

²¹⁰ DEGAND, 5 Répert. 554 no. 80.

²¹¹ Cass. (civ.) (March 18, 1878) S.1878.1.193; see also the similar case Vidal, Cour Paris (June 30, 1877) Clunet 1878, 268, where the fraud was agreed upon by both parties.

gian, Italian, and Latin American courts²¹² but has slowly lost its force in France itself.²¹³ The writers are aware that the acquisition of a foreign citizenship is an exercise of foreign state sovereignty that cannot be denied.²¹⁴ Moreover, the conception of *fraude à la loi* has made way in prevailing theory for a more general and elastic idea of public policy.

In Italy, however, where the subject of forbidden divorce remains of particular importance, courts and writers insist that a change of nationality may well be simulated by the parties for divorce purposes, i.e., not seriously intended, which is different indeed from acts so intended to evade the law. If they intend in reality to remain Italians and formally to regain their Italian citizenship at the first possible moment, especially when they have not transferred their domicile to their alleged new homeland, according to an express requirement of the Italian nationality law,²¹⁵ they may have acquired a second nationality abroad but not lost the Italian one. Since they have double nationality, they are treated, according to the rule,²¹⁶ as nationals.²¹⁷

(d) *Effective change of personal law.* Indeed, the main doctrine of divorces *in fraudem legis* has been abandoned in

²¹² Belgium: App. Bruxelles (Aug. 5, 1880) Clunet 1880, 508 (in the same affaire Bauffremont); Cass. (civ.) (Jan. 19, 1882) Clunet 1882, 364.

Italy: App. Torino (July 22, 1912) 6 Rivista (1912) 588, Revue 1914, 187; App. Trento (Feb. 26, 1930) 23 Rivista (1931) 248.

²¹³ PERROUD, Clunet 1926, 19; AUDINET, 11 Recueil 1926 I 226; J. DONNEDIEU DE VABRES 481; *contra*: DEGAND, 5 Répert. 555 no. 83.

²¹⁴ See especially the Italian writers ANZILOTTI, 6 Rivista (1912) 595; UDINA, Elementi no. 137; also FEDOZZI 277, 482, although he retains a distinct theory of fraud.

²¹⁵ Act no. 555 of June 13, 1912, art. 8.

²¹⁶ See *supra* p. 120.

²¹⁷ Cass. Torino (April 11, 1921) 15 Rivista (1923) 153; App. Brescia (Jan. 24, 1923) Clunet 1924, 257; App. Genova (May 24, 1923) Clunet 1924, 1129. Cf. the writers cited in note 214 *supra*.

In France, LEREBOURS-PIGEONNIÈRE 137 no. 114 contends that the courts are unable to set aside the acquisition of a foreign nationality by an individual but are able to restore his character as a Frenchman, if the conditions of naturalization have been proved fictitious, the naturalized person never having intended to settle outside of France.

France.²¹⁸ By changing nationality, a party changes his personal law automatically. Divorce under the acquired statute is said to be not fraudulent against the prohibition of divorce but against the law of nationality, and consequently the former country cannot react through private lawsuits, though it may refuse the person's reinstatement to his previous nationality.

Italian courts have recognized most of the Fiume divorces²¹⁹ and similar decrees that came before them.²²⁰ The highest court recently confirmed the principle, hitherto prevailing though contested, that *exequatur* is not denied a foreign decree, even if the parties were formerly of Italian nationality.²²¹

Italy, however, resorts to political measures against former Italians divorced abroad. Ordinarily, they are barred from regaining Italian citizenship,²²² and an Italian intending to marry such a person is not likely to obtain the governmental authorization prescribed by Fascist discriminatory legislation.²²³

The Austrian Supreme Court went so far as to recognize not only the divorce of a former Austrian of Catholic faith who had become a Czechoslovakian citizen, but also the un-

²¹⁸ Cass. (civ.) (Feb. 5, 1922) *Clunet* 1929, 1258; Trib. civ. Seine (July 15, 1935) *Clunet* 1936, 867. With respect to the underlying theory, cf. J. DONNEDIEU DE VABRES 481 n. 4.

²¹⁹ The divorce decrees of Fiume granted to Italian nationals have finally been confirmed on the whole by Royal Decree of March 20, 1924, no. 352 art. 4; cf. App. Roma (May 31, 1927) *Giur. Ital.* 1927, I, 2, 400.

²²⁰ E.g. App. Milano (Nov. 24, 1920) *Monitore* 1921, 18, *Clunet* 1921, 625; and now in the first place Cass. (June 8, 1932) *Foro Ital.* 1932, I, 1452, 25 *Rivista* (1933) 91; App. Bologna (June 4, 1936) *Giur. Ital.* 1936, I, 2, 422 (Hungarian decree); App. Trieste (April 22, 1937) *Giur. Ital.* 1937, I, 2, 298 (Greek decree). There are contrary decisions, however, where the Hague Convention does not eliminate the question, see e.g. Cass. Roma (May 15, 1928) *Clunet* 1931, 758; App. Roma (Dec. 15, 1936) *Giur. Ital.* 1937, I, 2, 209 (Turkish decree).

²²¹ Cass. (July 13, 1939) *Foro Ital.* 1939, I, 1097, *Rivista* 1940, 478, the court recalls the plenary decision of Cass. Roma (Dec. 30, 1911) *Foro Ital.* 1912, I, 148 and others; cf. the note *ibid.*

²²² Law of June 13, 1912, no. 555 on nationality, art. 9.

²²³ Law of November 17, 1938, no. 1728, art. 2; see SERINI, "Legal Problems of Divorce in Italy," 28 *Iowa L. Rev.* (1943) 293.

married status of the other party who had remained an Austrian national,²²⁴ and to consider unmarried an Austrian Catholic woman who had changed to a foreign nationality, obtained a divorce, and then resumed her Austrian citizenship.²²⁵

The Tribunal of Amsterdam had recently to decide a case which could be regarded as a true prototype of a fraudulent divorce.²²⁶ A Dutchman clandestinely acquired Estonian nationality and, on the basis of a brief residence in Riga, obtained a Latvian divorce from his wife under the rather scandalous procedure of Latvia. The court acknowledged that the woman had become an Estonian citizen without knowing it and thereby was subjected to the law of that nationality. Fortunately, the judges found an older agreement of maintenance which could be taken as a basis for allocating adequate compensation to the wife. This rule also obtains in Brazil.²²⁷

An important limitation is contained in the Hague Convention on Divorce (art. 7 in conjunction with art. 4). It may be illustrated by the following example. Italian spouses acquired Hungarian nationality and obtained a divorce in a Hungarian court on the ground of desertion; the time of the desertion was calculated by including six months during which the parties still had been of Italian nationality. Recognition was refused in Italy.²²⁸

²²⁴ OGH. (June 30, 1937) Zentralblatt 1937, 814 no. 460; Clunet 1938, 354. This liberal practice was initiated by the plenary decision of Dec. 11, 1924, 6 SZ. no. 396, Judikatenbuch no. 18, and continued in numerous later decisions, for instance OGH. (May 11, 1932) 14 SZ. no. 108; (Nov. 14, 1934) 8 Jahrb. HR. 1935, no. 28; (Sept. 24, 1935) 8 Jahrb. HR. 1935, no. 2161, with the exception, however, of that of OGH. (March 27, 1935) 8 Jahrb. HR. 1935, nos. 1564, 1565, Clunet 1935, 1028. Cf. WALKER 635.

²²⁵ OGH. (May 11, 1932) 14 SZ. no. 108, 1 Giur. Comp. DIP. 327; OGH. (Oct. 8, 1935) J.Bl. 1936, 103; Clunet 1937, 335. Cf. WALKER in 1 KLANG'S Kommentar 321, 322.

²²⁶ Rb. Amsterdam (Dec. 22, 1936) W. 1937, no. 47.

²²⁷ BEVILAQUA, 6 Répert. 167 no. 43.

²²⁸ See ultimately App. Firenze (Feb. 25, 1933) 25 Rivista (1933) 467; Cass. (Nov. 15, 1932) 1 Giur. Comp. DIP. 391 no. 104; Cass. (Jan. 15, 1937) Foro Ital. 1937, I, 217, Giur. Ital. 1937, I, 1, 120 and the literature cited by MONACO, 7 Giur. Comp. DIP. no. 153.

8. Additional Application of Public Policy

With all the many specific obstacles to recognition of foreign divorce decrees, it seldom happens that the subsidiary intervention of public policy in its general functions is invoked. Just one case may be reported; the *Tribunal de la Seine* rejected the prayer of a French woman for recognition of a German decree of divorce which declared her guilty of anti-German utterances—a paradoxical treatment of the applicant.²²⁹

9. Renvoi

An interesting regard for the personal law has been introduced into the English and the New York law by a practice related to renvoi. In the English case of *Armitage v. Attorney General*,²³⁰ a divorce decree granted in South Dakota was recognized in England, because it would have been recognized in New York where the matrimonial domicile was. It is generally concluded therefrom that any decree affecting the status of husband and wife which is held valid by the private international law of the domicile, is effectual in England.²³¹

New York courts have established an analogous practice in connection with their well-known special rule by which they refuse to recognize as binding a foreign divorce decree against a spouse domiciled in New York, who was not personally served with process. Although the rule is said to be for the protection of New York citizens, in the case where the defendant is domiciled in another state, the courts of New York make their position dependent upon the effect given to the decree in the state of the defendant's domicile when ren-

²²⁹ Trib. civ. Seine (Nov. 23, 1922) Clunet 1923, 295 criticized by 3 FRANKENSTEIN 543 n. 16. For the disregard of penal prohibitions to remarry contained in foreign divorce decrees see SECRETAN, *Revue* 1926, 219, and *supra* p. 283, n. 169.

²³⁰ [1906] P. 135.

²³¹ CHESHIRE 363; cf. FALCONBRIDGE, "Conflict of Laws as to Nullity and Divorce," [1932] 4 D.L.R. 1, 44.

dered.²³² Extension of this renvoi has been advocated as a vigorous contribution to greater uniformity.²³³

In an analogous way, under the principle of nationality, as we have seen, consistency requires that a divorce rendered in a state other than the national state should be recognized in third countries, if recognized in the national state.²³⁴ Thus, indeed, some uniformity is achieved.

Illustrations: (i) (AG. Hannover (Oct. 10, 1931) IPRspr. 1932, no. 73.) Both parties were of Argentine nationality; they had married in Argentina. A divorce obtained in Uruguay was not recognized by the German court, because it was not recognizable under Argentine law.

(ii) (KG. (Feb. 11, 1938) JW. 1938, 870.) The husband of Austrian nationality and Catholic faith was domiciled in Budapest, Hungary; the wife had acquired Hungarian nationality. The divorce rendered in Hungary was sufficient to allow the woman to remarry even under Austrian practice.²³⁵ This Austrian practice has to be followed, said the Court of Appeals of Berlin.

A further case brings us to a combined application of the New York rule and this European rule.

(iii) (KG. (Oct. 14, 1932) IPRspr. 1932, no. 147.) Both parties were Germans who had emigrated to the United States, seemingly to New York. The wife established domicile

²³² Ball v. Cross (1921) 231 N. Y. 329, 132 N. E. 106; Dean v. Dean (1925) 241 N. Y. 240, 149 N. E. 844; Powell v. Powell (1925) 211 App. Div. 750, 208 N. Y. Supp. 153; cf. Restatement, New York Annotations § 113, 86.

²³³ 39 Harv. L. Rev. (1926) 640; LORENZEN, "Renvoi in Divorce Proceedings Based upon Constructive Service," 31 Yale L. J. (1922) 191, 194; Lorenzen suggests applying this doctrine to foreign parties; this seems possible without difficulty if we conceive of the New York rule as based on domicile rather than on the citizenship of the parties.

²³⁴ Austria: WALKER 730.

Germany: *supra* n. 165.

In France, a similar result should follow from the two generally adopted requirements for recognizing a foreign decree, that it must originate from a court having jurisdiction by French conceptions and that the decision should agree with that obtainable in application of French conflicts law; but see the controversy reported in 10 Répert. 150.

Switzerland: controversy, see BECK, NAG. 396 no. 12.

²³⁵ *Supra* n. 224.

in Reno and obtained a divorce there. The husband lived at the commencement of the suit in Brooklyn and later in Manhattan. The first condition for recognizing the Nevada decree in Germany was (C. Civ. Proc. § 328, no. 1) that the courts of the state to which the foreign tribunal belongs are competent according to German laws, i. e., of the domicil of the husband (C. Civ. Proc. § 13 par. 1) at the decisive moment of the divorce suit (C. Civ. Proc. § 606 par. 1). The Court of Appeals of Berlin held that the "state" to which the Reno court "belonged" was Nevada and not the United States, an obviously correct statement.²³⁰ But the court dismissed the suit for recognition for the sole reason that the husband was not domiciled in Nevada but in New York. It should have asked the question whether a New York court would recognize the decree, although the answer might have been in the negative on the ground of the special rule of New York.

If the domicil of the defendant husband, at the time of the commencement of the action had been, for example, in Connecticut and later in New York, the Nevada decree would have been recognized in Connecticut—upon the mere personal service of the husband in Connecticut²³⁷—and therefore also in New York, since commencement of the divorce action is regarded as the decisive moment for fixing jurisdiction. In consequence, the German court would have to recognize the divorce, whatever the German theory as to the time element may be.

III. CONCLUSIONS

The Supreme Court of the United States, in recent times, has evidently found it necessary to smooth out the complicated conditions of mutual recognition of divorce decrees among the states. Thus far, the Court has increased the import of the Full Faith and Credit Clause in two respects. The *Davis* case²³⁸ has declared that a party contesting in the divorce state

²³⁰ Cf. also annotation on the case, 1 *Giur. Comp. DIP.* 150 no. 39.

²³⁷ *Gildersleeve v. Gildersleeve* (1914) 88 Conn. 689, 92 Atl. 684 (regarding a South Dakota decree).

²³⁸ *Supra* p. 469.

the validity of a divorce on the ground of lack of jurisdiction, for instance, by appeal, forfeits his right of collateral attack in all other states. The *Williams* case²³⁹ enlarges the domain of compulsory recognition by eliminating the defense based on lack of personal jurisdiction over the defendant.

This second step effectuates a far-reaching simplification of the rules on recognition. Moreover, and this is a point well to be noticed, an ancient remainder is eradicated, to the great benefit of rational procedure; the lawyers of this country customarily think of "personal jurisdiction" as based on determinate manners of service of process. But the manner in which a defendant is cited to attend the trial seems out of relation to modern circumstances. What does it practically mean in our days, whether a party receives a summons to appear in court by the hands of a sheriff or marshal, by Federal mail, or by any reliable means of communication at whatever place in the United States? A husband or wife, in particular, may very well be required to traverse any distance in the country in such a vital cause. The costs of travel may make a difference, but, at that, the matter of bearing the costs may or may not need a general reform. On the whole, the ruling that the domicil of one party supports divorce jurisdiction, according to most of the state statutes before the *Williams* case and under the Constitution according to this decision, is not so much of an innovation as a clarification and simplification of the subject.

However, this change of law will signify salutary progress, only if the domicil of at least one of the parties in the divorce state remains a basic postulate, strongly enforced by all courts involved. It is not very encouraging that this point was discarded so easily in the decision of the *Williams* case. The necessity of a serious and honest domicil has become the only remaining protection of deserted spouses and, what is more, of the divorce legislations so ambitiously advanced in individual

²³⁹ *Supra* p. 467.

states. Without this last barrier, it would be true that the laxest divorce practice would prevail over all others.

In the light of this experience, the tendency of the *Davis* case or, to be specific, the application of the "boot strap doctrine" to divorce, is frankly to be regretted. If divorce jurisdiction be assumed on a fake affirmation of domicile, the mistake is not effaced by its repetition. Courts may be inclined to construe a defendant's acquiescence to allegations of domiciliary facts or to a judgment as effective waiver of the right of collateral attack, although this clearly runs against the old established principles prohibiting parties to a matrimonial cause from disposing of their rights. But to treat a protesting party like an agreeing one, in conflict with the principle that a party specially appearing for the purpose of denying jurisdiction should not lose thereby his analogous defense in another state, is particularly bad law in a field where truth should prevail.

The most effective weapon to fight evasion would be the requirement of a "minimum residence," if sternly observed in granting jurisdiction by the court of divorce and likewise in other courts when they re-examine the existence of a bona fide domicile in the divorce state. Quite recently, Lorenzen also has suggested that residence should extend over a reasonable period of residence, "say six months" and seriously considers that the Supreme Court or Congressional legislation should require such period as a requisite of due process. This corroborates my postulate, with the difference that Lorenzen admits mere residence as sufficient, on these conditions, as a fair basis for jurisdiction in divorce.²⁴⁰ In my opinion, jurisdiction in these cases has been stretched as far as it may reasonably be, if it is to be grounded in the domicile of only one party. That such domicile should be replaced altogether by

²⁴⁰ LORENZEN, "Haddock v. Haddock Overruled," 52 Yale L. J. (1943) 341, 352.

a mere temporary residence of one party is an idea that is becoming familiar through the operation of the divorce mills but which grievously encourages the evil of migratory divorce.

As to international relationships, the present chaos can be remedied only by thorough reforms of the domestic and conflicts laws. The claims of countries following the national law principle must be decisively relaxed; on the other hand, the irresponsible attitude with which *lex fori* is applied in other countries ought to be renounced.

Effects of Divorce

I. EFFECTS OF NON-RECOGNIZED FOREIGN DIVORCES

1. View of the Country of Divorce and of Third States

IN the United States, it is possible that a divorce pronounced in one state may not be recognized in a sister state, because the court did not possess the jurisdiction required under the Constitution. In such cases, it is disputed whether the divorce is valid in the state where it was decreed.¹ But if so, as is commonly agreed, both parties to the dissolved marriage are undoubtedly able to remarry in the state of divorce, although not in every other state.

Yet, in comparable situations in countries following the nationality principle, other solutions have been reached. In France² and Switzerland,³ an Italian (or a Spaniard, a Chilean, a Colombian), whose national law forbids the dissolution of his marriage, is not permitted to remarry, despite his divorce in a French or Swiss court. Such a divorce may have been granted either by inadvertence or on a theory like that of the *Ferrari* case, whereby one party of French nationality is entitled to divorce irrespective of the national law of his spouse.⁴

In Germany, the question whether an Italian divorced in a German court for some exceptional reason—for instance be-

¹ For invalidity, Restatement §§ 111, 113 comment g. *Supra* p. 466, n. 22.

² Trib. civ. Seine (May 5, 1919) S.1921.2.9, *Revue* 1919, 543; *cf.* NIBOYET, S.1921.2.9; DEGAND, 5 *Répert.* 557 no. 92. It is notable, however, that the reporting judge at the Cassation Court in the *Ferrari* case considered remarriage in France quite possible for the Italian husband; see Bull. Soc. d'Études Leg. 1930, 104. LEREBOURS-PIGEONNIÈRE 400 no. 338 is of the same opinion, although he thinks the husband would be unable to sue for divorce.

³ Swiss Circular Letter (June 29, 1929) *Clunet* 1930, 539 advises civil officials to refuse remarriage to an Italian whose marriage has been dissolved in Switzerland.

⁴ *Supra* pp. 442-445.

cause the wife was of German nationality—could be permitted to marry in Germany, has been difficult. In such case, which should prevail: the authority of *res judicata* owing to a domestic judgment, and in consequence the man be considered unmarried, or compliance with the Italian family law ordained by private international law, and the capacity of the man to remarry be denied (EG. art. 13)? While the older decisions followed the first, procedural, line of thought,⁵ numerous writers have insisted on the requirement allegedly posited by the principle of conflicts law⁶ and by this construction have impressed several courts.⁷ Opposition to this view exists⁸ and is justified. It is well-nigh absurd to regard a person divorced at the forum as married. Should he succeed in having the new marriage celebrated, not even those who recognize the foreign impediment presume to regard it invalid.⁹

Dutch and Belgian courts have realized that divorce should never mean dissolution of the marriage for one party and continuance of marriage for the other. A Spaniard of Catholic faith, mistakenly divorced in a Netherlands court, was permitted to remarry in the jurisdiction in view of the formally binding force of the Dutch decision and of the record in the register of civil status.¹⁰ In Belgium, as we have seen, courts for the same reason either deny divorce to a couple of mixed

⁵ KG. (March 13, 1911) 23 Z.int.R. (1913) 331, aff'd RG. (March 21, 1912) JW. 1912, 642.

⁶ LEWALD 118 no. 163; STEIN-JONAS, 1 ZPO. § 328 F n. 134, 2 ZPO. § 606 n. 22; RAAPE 404; M. WOLFF, IPR. 133; 4 Rechtsvergl. Handwörterb. 401; and particularly 3 FRANKENSTEIN 101 n. 159; *ibid.* 102. MELCHIOR 251 reaches the same result on his theory of the preliminary question.

⁷ OLG. Hamburg (Jan. 3, 1923) 43 ROLG. 347; AG. Hannover (1928) IPRspr. 1929, no. 71 and especially KG. (July 11, 1924) StAZ. 1924, 306; KG. (Oct. 17, 1930) IPRspr. 1931, no. 62; KG. (March 7, 1938) JW. 1938, 1258 no. 27.

⁸ BAR, 8 Z.int.R (1898) 463; REICHEL, Ausländerscheidung, 124 Arch. Civ. Prax. 200; NUSSBAUM, D. IPR. 163 n. 2, and cf. 439; WIERUSZOWSKI in 4 Leske-Loewenfeld I 77 n. 479; MASSFELLER, JW. 1938, 1259.

⁹ KG. (March 13, 1911) 24 ROLG. 19, approved on this point by RAAPE 404; KG. (March 7, 1938) JW. 1938, 1258 no. 27.

¹⁰ Rb. Rotterdam (April 14, 1930) W. 12197.

nationality, when the personal law of one party is hostile to divorce, or grant dissolution with effect for both parties.¹¹

A similar problem arises in a third state when a foreign divorce decree is not recognized by the personal law. Again, the opinion classifying the question as concerning capacity to marry rather than the effects of divorce, has found favor.¹² In fact, in this case, refusal of remarriage is not in open conflict with the authority of the forum, so that the primary rule for questions of status may have free play.

2. View of the Personal Law

The country to which a party belongs will normally deny any legal effect to a foreign divorce which it does not recognize; maintenance will be granted as by virtue of a valid marriage. Thus, remarriage or further marriages of either party will be considered invalid, the issue illegitimate, *et cetera*. A maintenance order, predicated on the assumption of jurisdiction *in rem* by a foreign divorce court, even though issued *in personam*, has been regarded as void in England, because the foreign court was considered incompetent to grant divorce and the order was ancillary to divorce.¹³

In actual fact, of course, any divorce subjects the conjugal union to a most severe shock.¹⁴ The facts that one party has instituted an action for divorce, that this party has remarried and cohabited with a new spouse, may each constitute a ground for divorce by the other party, if divorce is allowed at all in

¹¹ *Supra* pp. 444-445.

¹² See for France: AUDINET, 11 Recueil 1926 I 236; DEGAND, 5 Répert. 557 no. 91; for Brazil: Trib. Sup. Fed. (Nov. 4, 1916) Clunet 1919, 402; for Germany the authors *supra* n. 6.

¹³ Simons v. Simons [1939] 1 K. B. 490.

¹⁴ 3 ARMINJON 44 thinks indeed that a prohibition of divorce by the law of the forum should be directed exclusively against a second marriage, the marital union being hopelessly destroyed by the foreign divorce. Cf. DEGAND, 5 Répert. 556 no. 88. Refusal to restore conjugal community after a foreign divorce is not considered desertion in Denmark; see MUNCH-PETERSEN, 4 Leske-Loewenfeld I 748 n. 96.

the home country.¹⁵ The same result is reached through those statutory provisions in the United States whereby the procuring of a divorce outside the state by one party gives the other party a ground for divorce, although these provisions also cover other cases.¹⁶

A foreign decree, however, may be partially recognized in the country of the personal law. Thus we have seen that in some cases a foreign spouse has been regarded as released from the bonds of marriage, while the spouse who is a subject of the forum remains bound. Under the Ohio statute, this particular case entitles the latter to a divorce.¹⁷ The outstanding example of one-sided effect ascribed to divorce is presented in this country by the special rule in New York that, in the absence of personal jurisdiction, a foreign decree of divorce obtained against a spouse domiciled in New York is good by estoppel as to the libellant but not good as to the respondent.¹⁸ Under the Brazilian practice mentioned above,¹⁹ the Brazilian party to a mixed marriage dissolved abroad remained married

¹⁵ England: Adultery, at that time the only ground for divorce, was found in *Clayton v. Clayton* [1932] P. 45; in *Lanckester v. Lanckester* [1925] P. 114 a similar result would have been adjudicated but for connivance of the applicant in the foreign divorce.

Germany: ObLG. Bayern (May 24, 1924) 2 Jahrb. FG. 148; OLG. Königsberg (Oct. 29, 1914) Pos. Mschr. 1914, 157, cited by NUSSBAUM, D. IPR. 164 n. 2. LG. Berlin (Jan. 9, 1937) JW. 1937, 1307 (adultery committed by celebration of a marriage "by dispensation" in Austria). Doubts in other decisions were concerned with the requisite of fault for divorce, which is no longer indispensable under German law.

¹⁶ Florida: Stat. (1941) § 65.04, No. 8: "that the defendant has obtained a divorce from the complainant in any other state or country."

Michigan Stat: Ann. (1937) § 25.86, No. 6: "And the circuit courts may, in their discretion, upon application, . . . divorce from the bonds of matrimony any party who is a resident of this state, and whose husband or wife shall have obtained a divorce in any other state." Cf. *supra* p. 404.

Ohio: Code Ann. (1940) § 11979, No. 10: "the procurement of a divorce without this state, by a husband or wife, by virtue of which the party who procured it is released from the obligations of the marriage while they remain binding upon the other party."

¹⁷ See preceding note.

¹⁸ *People v. Baker* (1879) 76 N. Y. 78, 32 Am. Rep. 274, consistently followed; see Restatement, New York Annotations § 113 at 85.

¹⁹ *Supra* pp. 496-497.

in the eyes of Brazilian law, but the non-Brazilian spouse was capable of remarrying even in Brazil.²⁰ The new Brazilian law seems to reverse the latter rule.²¹

Moreover, a foreign divorce *a vinculo*, though not recognized in Brazil, is given the same effect upon the property of the spouses as a Brazilian separation from bed and board; this concession has been termed the only possible compromise.²²

II. EFFECTS OF VALID DIVORCES

The effects of divorce or, pursuant to another conception, the continued effects of marriage after "dissolution"²³ are usually discussed in the United States with respect to (1) alimony, (2) dower, and (3) custody of children. In recent times, civil law lawyers have used broader categories for each of these subjects; they distinguish the influence of divorce upon (1) personal relations between husband and wife, (2) marital property, and (3) parental rights.

For the purpose of conflict of laws, further division of the subject is necessary. On the one hand, we must distinguish the inquiries: (a) whether the divorce court has power under its own law to decide upon those effects or some of them; (b) if it has power so to decide, which law it must apply; and (c) whether its decision is recognized and enforced in other jurisdictions. On the other hand, there are analogous problems in case a divorce decree has been rendered in one jurisdiction and a related suit, as for alimony or custody, is brought in another.

²⁰ BEVILAQUA, 6 Répert. 167 no. 41.

²¹ Brazil: Lei de Introdução (1942) art. 7 § 6.

²² Brazil: Sup. Trib. Fed. (Nov. 4, 1916) Clunet 1919, 402.

²³ NEUMEYER, IPR. (ed. 1) 21. It need hardly be mentioned that no problem exists with respect to the fact that every divorce decree, if recognized, determines the time, the extent, and the conditions for terminating the bond of marriage. E.g., a Belgian court grants exequatur to a French divorce without requiring that the decree be recorded within two months, as is necessary for a Belgian decree, by a different interpretation of art. 264 of the Civil Code common to both countries; Trib. civ. Termonde (Oct. 17, 1936) Rechtsk. Wkbl. 1936-1937, 1634, 3 Giur. Comp. DIP. no. 183.

Not all these diverse problems have been dealt with explicitly, although some have been vividly discussed in a few countries and others are engulfed within other topics. There is no point in subjecting all these questions to one sole conflicts rule. Earlier writers in Europe contended that all effects of divorce are governed by the national law, whereby ordinarily the law presiding over the divorce was meant.²⁴ But the conflicts rules derived from the nationality principle have been differentiated; there are different rules for personal relations of the spouses, for property relations, for parental rights and duties incident to the granting of divorce, and, moreover, there exist problems peculiar to marriages of mixed nationality. The prevailing tendency, briefly reported below, favors in each topic application of the rule that is called for by the most nearly related sphere of family life.

We still find rules of broader scope in a few regulations, characterized by the preponderance of the last matrimonial or common domicil. For instance, a Danish court will recognize not only the limitations on the right of remarriage resultant from a divorce decree of the foreign matrimonial domicil, but also its legal effects on the property of the parties.²⁵ By article 55 of the *Código Bustamante*, "the law of the court before which litigation is pending" determines the judicial consequences of the action and the terms of the judgment with respect to the spouses and their children. It seems that this court is ordinarily that of the matrimonial domicil. Particularly elaborate is a provision of the Scandinavian Convention on Family Law, in which divorce jurisdiction with certain exceptions is fixed at the last common domicil. It seems instructive to reproduce this provision:

In connection with petitions for separation or divorce, the same or another authority of the divorce state may decide also

²⁴ See e.g., 2 FIORE no. 695; also though more careful, WEISS, 3 *Traité* 702.

²⁵ MUNCH-PETERSEN, 4 *Leske-Loewenfeld* I 747 n. 94.

on the provisional suspension of conjugal rights to property division, damages, alimony, and parental rights. (Art. 8, par. 1.)

Claims later instituted concerning alimony or parental rights are decided in the state in which the defendant spouse is domiciled. This applies also to modification of awards rendered in another of the participant states. If, by the law of the state in which separation or divorce has been pronounced, alimentary sums for a separated or divorced party may not be awarded or increased, no such decision can be made in the other participant states. (Art. 8, par. 2.)

In rendering decision under articles 7 and 8 in each state, the law there in force is to be applied. Decisions, however, on division of property or on damages always must be based on the law applicable to the conjugal property relations according to article 3. (Art. 9, par. 1.)

For civil law countries, it should be borne in mind that jurisdiction is a matter entirely different from choice of law; the former is not here involved.

1. Effects on Personal Relations between Husband and Wife

(a) *Name, capacity, gifts, et cetera.* What law determines, for instance, whether a divorced wife ought to resume her maiden name, to retain that of her husband, or to have her choice as under the common law? Should a divorce court determine this question according to its own family (or other) law, or according to the same family law that was applied in granting the divorce, or according to the law that governed the personal relations of the parties during coverture? The subject matter includes, among other things, alimony, a topic presenting peculiarities.

(i) *The law of the forum.* The application of the domestic law seems natural within systems that make the matrimonial domicil the exclusive basis for jurisdiction and choice of law in granting and recognizing divorce. But also in Switzerland,

although divorce is not granted unless the foreigners' national law accords, Swiss law determines every divorce decree and its ancillary effects.²⁶

In the United States, probably the law of the divorce forum governs. Except for alimony, however, the question seems not to have been discussed.

(ii) *The law of divorce.* To control the effects of divorce, the decidedly prevailing opinion on the European Continent has selected, among the various possibilities offered by the nationality principle, the law under which the marriage was dissolved.²⁷ In Germany, this is the national law of the husband at the time when the divorce suit was instituted (EG. art. 17, par. 1); in France, the national law of the party at whose instance divorce is granted. This rule refers to problems such as:

What name the wife ought to bear;²⁸

²⁶ See *supra* p. 429 and *ibid.*, n. 169.

OG. Zürich (Dec. 8, 1937) 38 Bl. f. Zürich. Rspr. 1939, 105 no. 42 therefore states that even if in the national courts the effects of divorce would not be expressed in the divorce decree itself and established by rules different from the Swiss rules, a Swiss divorce decree always causes Swiss law to be applied to all problems of damages and moral compensation, support, property, etc.

²⁷ France: for status and capacity see DEGAND, 5 Répert. 555 no. 86; NIBOYET nos. 642, 753 pars. 6 and 7.

Germany: RG. Plenary Decision (June 25, 1898) 41 RGZ. 175, 9 Z.int.R. (1899) 382, Clunet 1900, 161; KG. (May 30, 1938) JW. 1938, 2750 (explains in agreement with the dominant opinion that EG. art. 17 par. 1 also governs the effect of divorce on personal relations such as name and alimony, while the reservation in par. 4 for German law is inapplicable).

Switzerland: BG. (Oct. 11, 1911) 37 BGE. I 400 (foreign divorce of Swiss nationals); cf. BECK, NAG. 398 no. 16; *ibid.* 375 no. 148.

Similarly Guatemala: C. C. (1926) art. 218.

The Hague Convention on Divorce contains no rule on the effect of divorce, see LEWALD in Strupp, 1 Wörterbuch des Völkerrechts und der Diplomatie 471 VIII.

²⁸ France: Cour Paris (Dec. 15, 1936) D. H. 1937. 72 (the national law of the foreigner); Cour Paris (June 16, 1904) Revue 1905, 146 (French law applied to the name of an American ex-wife because of renvoi); Trib. civ. Seine (Dec. 22, 1923) Gaz. Trib. 1924.2.204 (Frank Jay-Gould, after his divorce [see the New York case of Gould v. Gould cited *supra* p. 503], sued his former wife and the Alhambra Theater in Paris to enjoin them from advertising her performances under the name of Edith Kelly-Gould; the injunction was granted under French C. C. art. 299 because the defendant had submitted to French law in the divorce suit with the collateral argument that New York

Whether restrictions on the wife's capacity to contract disappear automatically with the end of the marriage;²⁹

Whether gifts between the spouses may be revoked;³⁰

Whether confidential communications between the spouses remain privileged in testimony.³¹

In addition, agreements between the spouses concerning a future divorce, since not operative during coverture, do not pertain to the law of marital relations but to that of divorce.³² According to this law, such agreements may be licit; if so, resort to a divergent public policy of the forum seems unnecessary to German courts.³³ French judges, however, always suspicious of an intention to facilitate divorce by consent, are inclined to assume that such agreements constitute an offense to the French public order.³⁴

(b) *Alimony following a foreign divorce.*³⁵ In accordance with an old conception, in England divorce still ends any

law permitted the same right to the plaintiff). For literature see PILLET, 1 *Traité Pratique* 627; TAGER, Clunet 1933, 96.

Germany: law of divorce, not the personal law of either spouse: KG. (Oct. 13, 1916) 33 ROLG. 343; LG. II Berlin (May 20, 1927) IPRspr. 1926-27, no. 75; cf. KG. (Dec. 17, 1926) IPRspr. 1926-1927, no. 74.

Switzerland: controversial; see STAUFFER, NAG. art. 8 no. 15; BECK, NAG. 373 no. 145, *ibid.* 466 nos. 226, 227; cf. *ibid.* 398 no. 16, *ibid.* 414 no. 67.

A Swiss divorced woman must resume her premarital name, but if a woman after a foreign divorce recovers Swiss nationality, she is entitled to the name she has according to the foreign law. See Just. Dep., BBl. 1924, II 24 no. 2; GAUTSCHI, 26 SJZ. 22; Government of Bern, 27 SJZ. 137, no. 23.

²⁹ RAAPE 430 no. 6; M. WOLFF, IPR. 132 n. 14. In France BARTIN, who had advocated the law of the forum, now suggests with WEISS, 3 *Traité* 702, the personal law of the woman; see BARTIN, 2 *Principes* 311 § 316.

³⁰ RAAPE, 2 D. IPR. 187.

³¹ This point familiar in American law is not expressly mentioned in the European literature.

³² Germany: KG. (Sept. 25, 1933) IPRspr. 1933, no. 32 (Hungarian law); OLG. Naumburg (Feb. 26, 1936) JW. 1936, 1798; cf. RAAPE, 2 D. IPR. 187; LORENZ, 7 *Giur. Comp. DIP.* 102.

³³ Cf. also KG. (Dec. 21, 1935) JW. 1936, 2466.

³⁴ See Cass. (req.) (July 29, 1929) *Revue* 1931, 334; Cass. (civ.) (Jan. 26, 1938) *Nouv. Revue* 1938, 567 (where the decree was rendered in France) and the decisions cited in *Nouv. Revue* 1938, 570 n. 1, and *contra*: COSTE-FLORET, 7 *Giur. Comp. DIP.* 215 no. 121.

³⁵ See especially HARWOOD, "Alimony after a Decree of Divorce Rendered on Constructive Service," 24 *Kentucky L. J.* (1936) 241. See JACOBS, "The Enforce-

duty of support between former spouses. Therefore, no action can lie to obtain alimony after a divorce *a vinculo*, whether pronounced by an English or a foreign court. A recognized foreign decree of divorce even terminates a former English maintenance order.³⁶

In the United States, many difficulties have been encountered. Although the English conception that the duty of support does not survive the dissolution of the marriage has not been maintained in this country, only this English background seems to explain a certain opinion that has proved very strong in the past, viz., that the rendering of the divorce decree is the last moment for alimony to be recovered. Where such a doctrine is invoked against a suit for alimony, undesirable situations may arise. Thus, a divorce court in one state may refuse to order the defendant to pay alimony, because it knows that according to the prevailing opinion, it does not have the necessary jurisdiction *in personam*.³⁷ Yet, the court of another state having the required personal jurisdiction, regards a suit for support after divorce has been pronounced as impossible. The result is the same when the foreign court awarded alimony but did not have proper jurisdiction.

The diversity of jurisdiction *in rem* and jurisdiction *in personam* presents a second source of difficulties. Paradoxically, it follows from the historical development, that the requirements for service of process on the defendant in such ancillary actions *in personam*, as enunciated by the Supreme Court, are greater than in divorce suits. It seems a neglected fact that

ment of Foreign Decrees for Alimony," 6 Law and Cont. Probl. (1939) 250; Note, 53 Harv. L. Rev. (1940) 1180; Note, 40 Mich. L. Rev. (1942) 596; SAYRE, "Recognition by Other States of Decrees for Judicial Separation and Decrees for Alimony," 28 Iowa L. Rev. (1943) 321. On the enforcement of alimentary decrees throughout the world, see International Institute for the Unification of Private Law, L'Exécution à l'étranger des obligations alimentaires (Rome, 1938).

³⁶ Pastré v. Pastré [1930] P. 80, 82 (French divorce); Mezger v. Mezger (1936) 155 L. T. R. 491, [1937] P. 19, Clunet 1937, 138 (German divorce).

³⁷ This has been contested but is now treated as settled. See 2 BEALE 1435.

the social importance of marriage and its dissolution surpasses the significance of any alimentary orders.

A third unexpected complication arises from interference of the estoppel idea. In cases where a wife sued for divorce in a jurisdiction powerless to grant alimony but where the right thereto was at issue, she has been deemed to have waived her claim to alimony once and for all by choosing such a divorce court. This all too technical idea, which has not been adequately criticized, is so faulty that its influence should not go far.

Finally, difficulties of another kind are encountered when an alimentary order is sought to be enforced in another jurisdiction. In particular, orders which may be altered have been considered to lack the finality necessary for enforcement.

It would not be helpful to discuss all these disturbances at length. Recent writers assure us that the entire doctrine is in an evolutionary stage, and that extraterritorial effect is given to decrees for alimony "with very great completeness."³⁸ Courts and statutes show themselves more and more anxious to overcome formalistic obstacles, to help deserted wives and children. The indigent ex-husband has also found more favor than before. Through such an evolution, the American doctrine approaches the views of the European laws.

In civil law countries, the nature of the duty incumbent upon a former spouse is far from undisputed in theory; does it follow from a breach of the marital duties? That it does was the leading idea of older codifications, including the German Civil Code. Or is the family relation partly conserved despite the dissolution of the marriage tie? Modern doctrines are inclined in some degree, indeed, to consider the obligation imposed by law as an effect of the former family relation and therefore as belonging to the field of family law rather than to the domain of ordinary obligations *ex lege*. In any case, the

³⁸ SAYRE, 28 IOWA L. REV. (1943) 333, *supra* n. 35.

existence of such obligations is not doubted; their incidence is continuously extended. For instance, the recent German marriage law no longer maintains that only an exclusively guilty ex-spouse can be required to support the innocent other party; it declares it to be sufficient that the defendant was mainly at fault in disrupting the marriage and even allows equitable awards beyond this limit. Thus, since alimony rests on the same foundations as any family law institution, no technical impediment obstructs the application of a foreign alimentary regulation. Moreover, litigation for alimony is usually separable from the divorce suit so that nothing prevents an action for alimony being brought in another country than that where the divorce was pronounced.

Difficulties arise, however, first, because a foreign divorce is quite often refused recognition and, secondly, because of the intervention of some distinct local policy at the court where the award is sought.

In Germany, the law of divorce is applied with nicety; it signifies the law of the husband at the time when the action for divorce was instituted.³⁹

In France, it seems that the law governing marital relations during coverture is preferred,⁴⁰ the alimentary obligation

³⁹ KG. (Feb. 16, 1909) 19 ROLG. 106, 20 Z.int.R. (1910) 227, Clunet 1911, 286 (without any doubt); LG. Altona (March 19, 1926) JW. 1926, 1357 (Danish law denying judicial remedy applied); KG. (Feb. 9, 1929) IPRspr. 1929, no. 15; OLG. Naumburg (Feb. 26, 1936) JW. 1936, 1798. This practice was in force before the Bürgerliche Gesetzbuch, see RG. (June 25, 1898) 41 RGZ. 175 (*supra* n. 27) and RG. (July 11, 1898) JW. 1898, 545, 9 Z.int.R. (1899) 116, Clunet 1900, 635. In the case of a German husband, a technical difficulty was presented by the requirement of guilt of the defendant and innocence of the applicant when the foreign decree of divorce contained no statement on the matter. But this obstacle could be overcome; see KG. (May 3, 1935) JW. 1935, 2750, and also RAAPE 426 II 1; the question is certainly not worse under the new law.

The Italian Court of Cass. (May 3, 1934) *Monitore* 1934, 889 gives much weight to the statements and awards of the foreign divorce decree but seems to decide the case according to Italian law perhaps because the plaintiff wife had recovered her Italian citizenship.

⁴⁰ NIBOYET 753.

In Portugal, CUNHA GONÇALVES, 1 *Direito Civil* 695 seems to advocate application of the husband's national law under the same viewpoint.

being traced back to the marital duty of support. Martin, however, limits this classification to that part of the money award that the French courts base on article 301 of the Civil Code, while other grants of alimony under the heading of damages should be governed by the law of the place of wrong.⁴¹

Jurisdiction for alimony is assumed in the Netherlands at the instance of domiciled persons on the basis of foreign divorces. Here again the law applied seems to be the *lex fori*.⁴²

The Swiss Federal Tribunal has taken another view in considering the problem of jurisdiction. If the divorce was rendered abroad, even if involving Swiss citizens, jurisdiction for ancillary effects is not exercised, unless the foreign courts refuse to assume jurisdiction because of the Swiss domicile of the party;⁴³ in such event, the Swiss court is required to intervene in order to prevent a denial of justice,⁴⁴ the *lex fori* being applied.⁴⁵

2. Effects on Marital Property

If a foreign decree of judicial separation has been recognized, it must be examined, in the first place, to determine whether it is intended to terminate the property regime. With this purpose in mind, French courts have stated that an Italian separation by mutual agreement and judicial confirmation,⁴⁶ as well as a Spanish separation from bed and board,⁴⁷ does not have the effect of property separation (*séparation de biens*),

⁴¹ MARTIN, 2 Principes 313.

⁴² See BW. amended by § 828a Rv. (law of May 16, 1934, S. 253) and H. R. (April 5, 1937) W. 1937, no. 661 declaring that the alimentary duty falls under the first book of the Code and also if based on a divorce pronounced in Germany. Cf. H. R. (March 8, 1934) W.12752 for a decree of the Netherland Indies; see other cases in 11 Z.ausl.PR. (1937) 210.

⁴³ BG. (March 29, 1928) 54 BGE. II 85; BECK, NAG. 370 nos. 133ff.; *ibid.* 420 nos. 89ff.

⁴⁴ BG. (Dec. 10, 1936) 62 BGE. II 265, Praxis 1937, 56. On modification of a domestic decree, if the defendant is domiciled abroad, see BG. (Nov. 22, 1935) 61 BGE. II 225, Clunet 1938, 973, and criticism *ibid.* 974.

⁴⁵ Constant practice since BG. (June 13, 1912) 38 BGE. II 43, 49; see BG. (Dec. 10, 1936) 62 BGE. II 265, 267.

⁴⁶ Cour Lyon (June 3, 1926) S.1928.2.121.

⁴⁷ Trib. civ. Seine (Feb. 13, 1908) Clunet 1908, 832.

which the French *séparation de corps* has under the Civil Code (art. 311).⁴⁸ But a separation from bed and board rendered in a Netherlands court necessarily effectuates a separation of property under article 298 of the Civil Code;⁴⁹ if the parties be Germans, therefore, this effect would not be recognized by their national courts.⁵⁰

All remaining questions concerning property regimes must obviously be answered by the law governing the property relations of the parties during coverture. For instance, after a dissolution of community property by an absolute divorce, whether a domestic divorce or a foreign divorce recognized as valid, the mode of partition of the community fund is naturally governed by the law governing marital property.⁵¹

Often a marital property settlement or a statute provides explicitly what must be done in case of divorce. Where such provision is lacking, a rule applicable in the event of the death of one spouse may reasonably be resorted to, while the *lex fori* of the divorce court is ruled out.⁵²

In agreement with this view, in common law countries the effect on movables of any divorce, domestic or foreign, and in Argentina of a foreign recognizable divorce, is governed by the law of the husband's domicile at the time when the movables were acquired; the effect on immovables by the law of the situs. In accordance with this rule, a wife's claim to dower depends upon the law of the situs regarding dower and es-toppel rather than upon that of the divorce court, unless the implications of the divorce decree as to dower be recognized at the situs.⁵³ In France, in conformity with the conflicts rules

⁴⁸ BARTIN in 7 Aubry et Rau 402, and NIBOYET 752 are in doubt whether this effect belongs under the heading of rules on marital property or those on the personal relations of husband and wife.

⁴⁹ Rb. Haag (Dec. 10, 1929) 6 Z.ausl.PR. (1932) 849; Rb. Almelo (June 24, 1931) W. 12370 and App. Arnhem (June 29, 1932) W. 12627, 11 Z.ausl.PR. (1937) 209 no. 59.

⁵⁰ M. WOLFF, IPR, 132 n. 15; STAUDINGER-ENGELMANN § 1586 III A, c(4).

⁵¹ Trib. civ. Seine (Jan. 25, 1882) Clunet 1882, 74.

⁵² DEGAND, 5 Répert. 558 no. 96; NIBOYET 752 II 1; M. WOLFF, IPR, 132.

⁵³ On the effect on the wife's claim for dower, see HARPER, "Effect of Foreign

on matrimonial property and in contrast with the conflicts rules on inheritance, immovables are not subject to special treatment.⁵⁴

The question, too, whether or when an agreement to regulate property relations after divorce is valid, has appropriately been decided according to the law governing marital property during coverture.⁵⁵

A particular position is taken in the United States when divorce courts are empowered to make dispositions of property of the spouses or to adjudicate damages between them. It would seem that a corresponding order of the court ought to supplement the regulation of property between the parties. In connection with the unsettled extraterritorial effect of personal decrees of a court of equity, dispositions of this kind, particularly when one party is ordered to convey land in another state to another party, have produced interstate difficulties.⁵⁶

3. Custody of Children

American courts disagree greatly on the conditions under which a court has jurisdiction in divorce proceedings to settle a dispute concerning custody of the children. It is disputed whether a pronouncement of this sort affecting the children

Divorce upon Dower and Similar Property Interests," 26 Ill. L. Rev. (1931) 397; HARPER and TAINTOR, Cases 1079 n. 32.

⁵⁴ App. Monaco (May 7, 1910) S.1912.4.25, Clunet 1910, 1327; App. Monaco (March 16, 1912) Revue 1912, 789.

⁵⁵ KG. (Dec. 21, 1935) JW. 1936, 2466, Nouv. Revue 1937, 98 (agreement valid under Hungarian Marriage Law of 1894, § 92, recognized according to EG. art. 15, setting art. 17 (law of divorce) aside). *Contra*: KG. (Sept. 25, 1933) IPRspr. 1933, no. 32 (applying EG. art. 17 not only to alimentary but also to property agreements).

⁵⁶ Enforcement was granted at the situs, probably in view of fraud committed against the order in *Spalding v. Spalding* (1925) 75 Cal. App. 569, 243 Pac. 445; *Matson v. Matson* (1919) 186 Iowa 607, 173 N. W. 127; *Mallette v. Scheerer* (1916) 164 Wis. 415, 160 N. W. 182; refused in *Bullock v. Bullock* (1894) 52 N. J. Eq. 561, 30 Atl. 676; *Fall v. Fall* (1905) 75 Neb. 104, 113 N. W. 175. Cf. STUMBERG 120.

is to be treated as a judgment *in personam* or as a judgment *in rem*. Statutory power conferred on a divorce court to award custody, however, seems to be recognized in other states⁵⁷ unless circumstances are changed, provided both parties were residents of the divorce forum and the child, therefore, had no other domicil. For, in the most widespread and authoritative opinion, jurisdiction to determine the custody of children is primarily located at the domicil of the child.⁵⁸

There is concern expressed in the literature, however, that the jurisdiction of the forum for awarding custody should not be obtained unilaterally by one spouse, drawing the child away without the other's consent.

Every court in the United States applies its own municipal law, so that again there is no question of choice of law. In England and Argentina, and under the Conventions of Montevideo and of the Scandinavian States, the forum coincides with the conjugal domicil. In France, the *lex fori*, rather than the personal law, is applied, even in cases such as the *Ferrari* case, where only one of the spouses had acquired French nationality;⁵⁹ but probably not where two foreigners are concerned and the child is of foreign nationality too.⁶⁰

In Germany, however, the conflict of law problem has been thoroughly separated from that of jurisdiction and extensively discussed. The *lex fori* was applied in a single case where the divorced wife of foreign nationality had later acquired German nationality, on the ground that the domestic regu-

⁵⁷ Restatement § 146; see 27 C. J. S. (1941) Divorce § 329.

⁵⁸ Restatement §§ 117, 145. GOODRICH, "Custody of Children in Divorce Suits," 7 Cornell L. Q. (1921) 1 and GOODRICH § 132. A disturbing element is the view "that a court having jurisdiction to award the custody retained jurisdiction to modify its award although the domicile of a child has been changed in the meanwhile to another state," LORENZEN, "Developments in the Conflicts of Laws 1902-1942," 40 Mich. L. Rev. (1942) at 798.

⁵⁹ Cour Paris (Dec. 21, 1937) Gaz.Pal.1938.1.405, D. H. 1938.186, Clunet 1938, 482.

⁶⁰ Cf. WEISS, 3 Traité 702. But Trib. civ. Seine (Nov. 29, 1904) Clunet 1905, 187 has applied French law to decide the provisional custody of the children in a suit of an American wife against her Turkish husband.

lation (BGB. § 1635) was mandatory.⁶¹ But this construction has been generally rejected as an excessive expression of the exigencies of public policy. According to another opinion the relationship between the former spouses as respects custody of the children was considered governed by the law determining the right to divorce (EG. art. 17), while other matters would fall under the conflicts rule determining the parent-child relation (EG. art. 19).⁶² But prevailing opinion now holds that every right of a parent to custody, education, or visiting affects the children's interest and has to be determined by the law that governs legitimate filiation.⁶³ Where German spouses have been divorced abroad by a recognized decree but custody was not awarded in accordance with German family law, the order is regarded as a temporary measure only.⁶⁴

In the Netherlands also, not the law of the forum, now repeatedly applied to govern divorce, but the ordinary conflicts rule on parental and filial relations is applied.⁶⁵ Accordingly, the law of the child governs, while in Germany that of the father is applicable. The classification is the same, however, and would be suitable to any country.

By this time, it should be understood everywhere that custody of children or any other incident of parental relations is not a matter substantially ancillary to divorce, although the divorce court may have power to take care of these matters

⁶¹ RG. (Feb. 20, 1913) 81 RGZ. 373.

⁶² HABICHT 143, 152; LEWALD 120, 137. Another opinion suggested simply applying EG. art. 17 (law of divorce), see NIEDNER 54, art. 17 comment 4d; NIEMEYER, IPR. des BGB. 157; RGR. Kom. (ed. 8) prel. no. 6 to § 1616.

⁶³ KG. (March 6, 1929) 41 Z.int.R. (1929) 413; KG. (Feb. 10, 1933) JW. 1933, 2065; KG. (May 3, 1935) JW. 1935, 2750; KG. (May 12, 1938) Nouv. Revue 1939, 251; OLG. Breslau (May 9, 1938) Dt. Recht 1939, 869 following RAAPE 482; see also RAAPE, 2 D. IPR. 187; NUSSBAUM, D. IPR. 164 n. 4.

⁶⁴ See decisions of KG. preceding note.

⁶⁵ See Rb. Amsterdam (June 24, 1937) W. 1937, no. 970; Hof Amsterdam (Feb. 11, 1937) W. 1937, no. 950.

Belgium: App. Bruxelles (March 1, 1928) Clunet 1928, 482 (personal law of Australian parents applied in principle).

Italy: Trib. Napoli (July 13, 1932) Rivista 1933, 281 (Italian law, the parents having, after Hungarian divorce, recovered Italian nationality).

and a divorce is a seasonable occasion to regulate custodianship. If the court applies its own family law, as it does in this country, it should qualify its application in the not infrequent cases where the applicant has been able to choose the forum at will. Whatever the principle of assuming jurisdiction may be and whatever the binding effect of an award of custody, the applicable law should be determined in conformance with the standard adopted in filiation matters.

Annulment of Marriage

I. ANNULMENT DISTINGUISHED FROM DIVORCE

CONFLICTS rules determining the extraterritorial effect given to annulment of marriage are concerned in the first place with any decree or judgment declaring a marriage void or annulling it and intended to operate *in rem* throughout the world, i.e., with the effect of *res judicata* for all persons. These rules, however, must evidently also be applied to annulments, such as those in certain of the states of the United States, that are conclusive only against the parties and those claiming under them. All types of void and voidable marriages are included.

Annulment is no longer confused with divorce, as it was in former times,¹ although some American statutes still speak of divorce granted for antenuptial causes such as bigamy, incest, duress, physical incapacity, or near kinship.² It is certain that a decree of "divorce" in such cases has nullifying effect.³ In exact terminology, nullity cannot be based on grounds other than those existing at the moment of the solemnization of the marriage, while divorce must have a cause either posterior to the celebration or at least continuing during coverture. In the law of conflicts, this seems to be accepted.⁴

Nevertheless, the Restatement mentions annulments, the causes of which antedate the marriage but the effects of which

¹ COKE ON LITTLETON (HARGRAVE and BUTLER) 235a; BLACKSTONE 440.

² I VERNIER §§ 50, 68, 70, 72, 73; SCHOULER, Domestic Relations §§ 1154, 1155; Reese v. Reese (1929) 128 Kan. 762, 280 Pac. 751.

³ See 27 C. J. S. (1941) 537-538.

⁴ Restatement § 115 comment c; Sorenson v. Sorenson (1924) 122 N. Y. Misc. 196, 202, 202 N. Y. Supp. 620, 625.

Brazil: App. Civ. Capital São Paulo no. 6441 (Aug. 5 and July 27, 1912) 60 Gaz. Jur. São Paulo (1912) 195.

operate only from the time of the decree.⁵ These are considered in the Restatement according to the rules of conflicts established for divorce rather than those relative to annulment.⁶ It is difficult to understand the reason for this treatment. The Swiss Code and also the German law as recently reformed contain precise parallels; they provide for rescission of marriages on grounds that existed at the time of the marriage celebration and with the effect of terminating rather than annihilating the bond of marriage.⁷ The effect described is similar to divorce. Yet, for the purpose of conflict of laws, the Swiss and German institutions have rightly been classified in the category of annulment. They are governed by the personal law of the person entitled to sue and not by the law which would govern divorce.⁸ Annulment can never be governed by the law of the forum, as divorce is in the United States. The reasons are perfectly understood in this country; ⁹ an impediment vitiating the celebration of a marriage must be evaluated under the law establishing the requirements of that celebration.

⁵ Restatement § 115 (2). 1 BEALE § 115.2 asserts that in most states annulment takes effect at the time of the decree of annulment and therefore takes place at the present domicil. A contrary statement that such effect is prescribed by only a few statutes is to be found in 38 C. J., Marriage § 139 with the citation of New York only, for which state the Restatement, New York Annotations, § 115 (2) declares that no such annulment exists there. In fact the text of the New York Domestic Relations Law § 7 on marriage "void from the time its nullity is declared by the court of competent jurisdiction," has been construed as meaning retroactive operation of the judgment and destruction of the marriage *ab initio*. See Matter of Moncrief (1921) 235 N. Y. 390, 139 N. E. 550; SEALY, Law of Persons and Domestic Relations (ed. 2, 1936, New York) 562; HAMMILL, "The Impediment of Nonage," 3 The Jurist (1943) 475, 477 n. 11.

⁶ Restatement § 136(a).

⁷ Swiss C. C. art. 132.

German Marriage Law of 1938, § 42 par. 1 which provides that the effects of a rescission of a marriage are determined according to the provisions concerning the effects of divorce.

⁸ RG. (May 7, 1936) 151 RGZ. 226 classified the Swiss action annulling the marriage under EG. art. 13 par. 1; RAAPE, 2 D.IPR. 145; his assertion that the wife does not lose the nationality acquired by the marriage (at 175) is inexact; cf. for Switzerland, BECK, NAG. 263 no. 159.

⁹ Cf. on this point, the explanation of GOODRICH 355.

II. ANNULMENT OF THE MARRIAGE OF FOREIGNERS

1. Jurisdiction

(a) *Court of the place of celebration.* When marriage was conceived of primarily as a contract,¹⁰ jurisdiction for deciding on its validity or invalidity was thought to be vested naturally in the tribunal of the place of celebration. This is still the rule in Argentina,¹¹ and as recently as 1938 a court in Paris tried to justify French jurisdiction over a marriage of foreign parties by a similar argument.¹²

The English authorities asserted the jurisdiction of the English courts to annul English marriages until recent years.¹³ The present decisions are understood to say that where the parties are domiciled abroad, the jurisdiction *loci celebrationis* of the English courts is neither exclusive nor complete; it concurs with that of the foreign domicile and is restricted to absolutely "void" marriages, such as those vitiated by bigamy or the non-observance of formalities. Annulment of "voidable" marriages on the ground of coercion, essential error, or impotence, is considered exclusively reserved to the domiciliary court, because it effects a change of status.¹⁴ This dis-

¹⁰ 1 BEALE 510 professes this conception and strongly advocates the jurisdiction of the place of celebration.

¹¹ 2 VICO no. 79.

¹² Trib. civ. Seine (June 3, 1938) *Revue Crit.* 1938, 668, *Clunet* 1939, 87.

¹³ *Simonin v. Mallac* (1860) 2 Sw. & Tr. 67; *Linke v. Van Aerde* (1894) 10 T. L. R. 426; *Valier v. Valier* (1925) 133 L. T. R. 830 and the problematic cases *Ogden v. Ogden* [1908] P. 46 and *Sottomayor v. De Barros* [1877] 3 P. D. 1, [1879] 5 P. D. 94.

¹⁴ *Inverclyde v. Inverclyde* [1931] P. 29; see the important comment by CHESHIRE 344; *Goddard, L. J.*, in a dictum in *Simons v. Simons* [1939] 1 K. B. 490, 498, summarizes the law to the effect that since 1748 the court of the place of celebration has been regarded as having jurisdiction to pronounce the marriage null and void for failure of due celebration. The problem was ignored in *Easterbrook v. Easterbrook* (1944) 170 L. T. R. 26; see Note, 60 *Law Q. Rev.* (1944) 115.

Canada: *Fleming v. Fleming* (Ont. S. C. 1934) [1934] O. R. 588, [1934] 4 D. L. R. 90; *W. v. W.* (Manitoba) [1934] 3 W. W. R. 230; cf. *FALCONBRIDGE*, Annotation [1932] 4 D. L. R. 2, 28ff.; 3 *Giur. Comp. DIP.* 190 no. 88. See also *READ, Recognition and Enforcement* 243.

tion seems formalistic. It has also been pointed out that, in view of the British reluctance to recognize a change of domicile, a place where the parties live (without, however, being there domiciled) and have been married, provides a natural forum to try the validity of the marriage.¹⁵

In the United States many cases have favored the older English rule,¹⁶ and some statutes have also preserved it, at least under certain circumstances.¹⁷ Thus, the jurisdiction of the place of celebration has not completely disappeared. But it no longer has a significant role—the principle of domicile has decidedly won out.¹⁸

(b) *Court of the domicile*. At present, the regularly competent court is that of the domicile, and this is true, not only in the countries which use domicile as the test for determining status and consider paramount the interest of the domiciliary state in the validity of the marriage bond,¹⁹ but even in the countries generally following the principle of nationality.²⁰ The motive of the rule is to permit domiciled foreigners to bring their matrimonial causes before the local courts instead of compelling them to travel to their national countries.

¹⁵ KEITH, "Some Problems in the Conflict of Laws," 16 Bell Yard (1935), 4 at 16; MORRIS, Cases 179 criticizes the entire doctrine.

¹⁶ See 1 BEALE 511; GOODRICH 357, and, as a recent illustration, Mayer v. Mayer (1929) 207 Cal. 685, 696, 279 Pac. 783, 788.

¹⁷ See 1 VERNIER § 52 table XXI and Supplement.

¹⁸ See McMURRAY and CUNNINGHAM, "Jurisdiction to Pronounce Null a Marriage Celebrated in Another State or Foreign Country," 18 Cal. L. Rev. (1930) 105.

¹⁹ GOODRICH 355.

²⁰ The United States. Restatement § 115; GOODRICH 357.

England: Inverclyde v. Inverclyde [1931] P. 29, cited *supra* n. 14.

Canada: Fleming v. Fleming (Ont. S. C.) [1934] O. R. 588, [1934] 4 D. L. R. 90; Diachuk v. Diachuk (Manitoba, K. B.) (1941) 49 Man. R. 102.

Treaty of Montevideo on international civil law, text of 1889, art. 62; text of 1940, art. 59.

France: (if there is no domicile abroad) Trib. civ. Seine (June 17, 1927) Revue 1928, 332; Trib. civ. Seine (April 3, 1930) Revue 1930, 460.

Germany: C. Civ. Proc. § 606 par. 1; cf. KG. (June 4, 1934) IPRspr. 1934, no. 141; same for a declaratory statement that the marriage is non-existent: RG. (Jan. 5, 1925) 109 RGZ. 384.

Switzerland: The domicile of the plaintiff spouse is considered decisive by BECK, NAG. 252 no. 123.

As the matrimonial domicile is normally at the husband's domicile, the latter is usually regarded as decisive. There are exceptions not unlike those for granting divorce;²¹ they cannot be discussed here.

In contrast with divorce, which is refused to foreigners in a number of states when the jurisdiction of the forum is not recognized by the homeland,²² jurisdiction for annulment is not made dependent on such considerations, except perhaps in Switzerland.²³

(c) *Court of the national country.* Consistently with the nationality principle, in practically all Continental countries nationals of the forum may sue for annulment irrespective of their domicile.²⁴ In a few countries this jurisdiction is exclusive of foreign courts.²⁵ Sometimes a court defies its own general principle of domicile in order to help a national of the forum.²⁶

Moreover, for a wife who had belonged to the forum up to the time of her marriage, jurisdiction is assumed without difficulty on the consideration that a void marriage did not actually change her nationality.

²¹ Restatement § 115 and about eleven state statutes allow suit to be brought in the country where either party resides; see 1 VERNIER § 52.

²² German C. Civ. Proc. § 606 par. 1 is limited by par. 4 only with respect to divorce; see KG. (Nov. 7, 1935) 27 Warn. Rspr. 192; 3 FRANKENSTEIN 203 n. 85.

²³ OG. Zürich (Oct. 10, 1928) Bl. f. Zürich. Rspr. (1929) 139, no. 66, Clunet 1930, 524. To the contrary effect, App. Bern (Oct. 27, 1927) 24 SJZ. (1927-1928) 235 no. 54 assumes that the legislator forgot the case, and that the German provisions furnish the best solution; in the instant case jurisdiction is granted to a former Swiss woman who married an Italian in Switzerland.

²⁴ Cf. for instance France: Cour Paris (May 28, 1880) Clunet 1880, 300; GOULÉ, 9 Répert. 80 nos. 403ff.

Germany: C. Civ. Proc. § 606 par. 2 sentences 1 and 2; *ibid.* par. 3, sentence 2, extensively interpreted by STEIN-JONAS, 2 ZPO. § 606 V.

Switzerland: App. Bern (Oct. 27, 1927) 24 SJZ. (1927-1928) 237.

²⁵ *Supra* pp. 397-398.

In the Netherlands, art. 154a of the BW. has been interpreted as requiring a petition of the Dutch State Attorney and annulment by a Dutch court; see Rb. s'Gravenhage (August 26, 1938) W. 1939, no. 36.

²⁶ See, for instance, Denmark: Ostre Landsrets Domme (May 12, 1920) U.f.R. 1920, 628, 2 Zausl.Pr. (1928) 866, applying, moreover, the Danish law instead of that of the domicile.

The provisions of the Hague Convention on Jurisdiction are not applicable to annulment.²⁷

2. Applicable Law

(a) *Rule.* It has been explained above²⁸ that the rule embodied in section 136 of the Restatement is universally adopted. A court will apply the sanctions of the same law that is applied in ascertaining whether a marriage has been validly celebrated.²⁹ While in the United States this means that generally the law of the place of celebration alone is consulted, with the sole exception of certain absolute prohibitions of the law of the domicile of either party, in most countries formalities and intrinsic validity are tested by different criteria. The law of the forum, so significant for divorce, in principle is immaterial for annulment.³⁰

In consequence, the judgment usually pronounces the kind of nullity provided for by the applicable law rather than that of the *lex fori*. The German Supreme Court, for instance, in a case where a Swiss national obtained an annulment on the ground of having been deceitfully induced to enter into the marriage, adopted the sanctions of the Swiss Civil Code rather than those of the German law, and declared the marriage void *ex nunc* only, with the effects ordained by Swiss law.³¹ The Swiss Federal Tribunal declared a marriage void under the Austrian law of the parties whereby the marriage was retroactively destroyed (Allg. BGB., § 160), holding no support for the time previous to the judgment to be due, contrary to Swiss law (C. C. art. 132, par. 2).³²

²⁷ KG. (June 14, 1913) 27 ROLG. 108; RG. (May 7, 1936) 151 RGZ. 226.

²⁸ *Supra* pp. 229, 286.

²⁹ See LASALA LLANAS 130, 133; TRÍAS DE BES 83, 100. In Spain the jurisdiction of state courts applies to few nullity cases only for which the writers seem to favor the *lex fori*.

³⁰ This has been confirmed, against contrary opinions in Switzerland, by BG. (Dec. 2, 1943) 69 BGE. II 342, 344.

³¹ RG. (May 7, 1936) 151 RGZ. 226; cf. MASSFELLER, JW. 1936, 1949; LORENZ and ECKSTEIN, 7 Giur. Comp. DIP. 54.

³² BG. (Feb. 22, 1934) 60 BGE. II 75 no. 2.

(b) *Policy of the forum in favor of marriage.* The principle described above has been limited by special clauses in favor of the marriage in Sweden and Switzerland. The Swedish statute provides that a marriage between two foreigners, formally valid but void because of an intrinsic defect under the national law of one or both of the parties, should not be annulled in Sweden, unless it is also void under Swedish law or unless the King orders the foreign law to be applied.³³

The Swiss statute contains another clause; a marriage celebrated abroad, invalid according to the laws of the place of celebration, cannot be declared invalid in Switzerland, unless it is also invalid according to Swiss law.³⁴ Hence, no marriage is annulled for formal defects. The Federal Tribunal, in a recent decision, restricts this provision to Swiss citizens.³⁵

Both provisions give substance to the otherwise very obscure rule that traditionally goes through the Continental literature—that, even in the field of conflicts law, public policy of the forum is more favorable to the marriage after its celebration than when its celebration is still pending. In general, the difference between curable and nullifying defects is taken care of by the private law distinction between directory and mandatory prohibitions of marriage, and there is usually no question but that this distinction is observed in accordance with the law governing marriage requirements, without consulting the laws of the forum.

(c) *Policy of the forum against the marriage.* The forum may nevertheless impose its own grounds for impeaching a marriage. American courts, exercising jurisdiction for annul-

³³ Sweden: Int. Fam. L. of 1904, c. 2 § 1.

Chile: C. Sup. (Sept. 26, 1939) Gac. Trib. 1939 II 182, likewise refused annulment of a German marriage on a ground of German law unknown to the forum.

³⁴ NAG. art. 7f par. 2.

³⁵ BG. (Dec. 2, 1943) 69 BGE. II 342, 345. Many other doubts exist. GAUTSCHI, "Über die Anerkennung ausländischer Eheschliessungen" 27 SJZ. 321, 323 explained that foreign marriages may be simply contested by collateral attack so long as they have not been recorded in the Swiss register.

ment, are inclined to consider nullity on the ground of bigamy or incest without regard to the law of the place of celebration or that of the domicil.³⁶ Moreover, in particularly shocking cases, public policy will be affirmed.³⁷ In Europe, the best formulation of prohibitive public policy seems to agree with the result attained in practice in this country and in England with respect to polygamous marriages. A marriage valid under the law applicable according to the ordinary rule of conflicts will be regarded as valid at the forum, provided not only its celebration but also its existence within the forum does not offend the local public order.³⁸ In this field, it may happen that any law may be applied in order to help a deceived woman.³⁹

(d) *Adjustment of the applicable law.* We may recall here the conflicts arising out of the varied scope of annulment of marriage in the national laws. While under Soviet Russian law a marriage may be very simply dissolved but cannot be annulled, some German writers suggest either that a Soviet marriage may nevertheless be annulled⁴⁰ or that it may be dissolved,⁴¹ on the assumption that the Russian institution of divorce also covers the ground of the German annulment. Analogous cases may occur everywhere.

But where divorce is forbidden and annulment allowed on an abnormal scale, especially by a broad construction of error

³⁶ See STUMBERG 266.

³⁷ In *Cunningham v. Cunningham* (1912) 206 N. Y. 341, 99 N. E. 845, Clunet 1913, 663, an 18-year-old girl married the valet of her parents secretly in New Jersey; the Court annulled the marriage on the ground of nonage and lack of parental consent according to the principles of discretion prevailing in New York irrespective of the unsettled question whether the marriage was valid in New Jersey.

³⁸ See, for instance, RAAPE 802; M. WOLFF, 4 Rechtsvergl. Handwörterb. 402.

³⁹ Brazil, Sup. Trib. Fed. (April 20, 1932) App. Civ. no. 3533, 23 Arch. Jud. 421 applied the New York law to the marriage of a German wife with a husband, native of Austria and naturalized United States citizen, in view of the fact that under German law, applicable to a deceived party, her action was lost by limitation.

⁴⁰ 3 FRANKENSTEIN 196.

⁴¹ RAAPE, 2 D. IPR. 177.

in marrying, neither divorce nor annulment will be granted to foreigners against their personal law.

III. RECOGNITION OF FOREIGN ANNULMENTS

In the recognition of foreign annulments, reference may be made in every respect to the principles governing the recognition of foreign divorce decrees. The Restatement, § 115, even considers the matter identical with dissolution of marriage by divorce.

Thus, it has been decided according to this principle in England that a nullity decree pronounced by the court of the foreign matrimonial domicile is entitled to universal recognition; while this was first settled only with respect to a marriage celebrated abroad,⁴² it has now been declared also in the case of an English marriage.⁴³

In France, it has been held that in the event one party is of French nationality, French law must be applied and a decree of exequatur is indispensable for recognition.⁴⁴

In Italy, jurisdiction of the state courts is not exclusive,⁴⁵ but a canonical marriage with civil effect celebrated in Italy after the effective date of the Concordat cannot be annulled by any temporal tribunal.⁴⁶ A fraudulent, i.e., not serious and

⁴² *Salvesen v. Adm'r of Austrian Property* [1927] A. C. (H. L.) 641.

⁴³ This point, left open by the House of Lords in the *Salvesen* case, was decided more definitely than in *De Massa v. De Massa* [1939] 2 All E. R. 150 (Note, 48 Law Q. Rev. (1932) 13; CHESHIRE 352), in *Galene v. Galene* [1939] P. 237, [1939] 2 All E. R. 148 (English marriage, French domicile of the husband, French decree of nullity on the ground of want of the father's consent; the decree was recognized irrespective of the choice of law).

⁴⁴ See VALÉRY 838 no. 594, and 1074 no. 749, and the French diplomatic note in RG. (March 19, 1936) 150 RGZ. 374.

⁴⁵ Cass. (July 22, 1930) *Testa v. Rosasco*, Giur. Ital. 1930, I, 1041; see Swiss Federal Tribunal (June 17, 1932) 58 BGE. II 190. On the requisite of domicile for recognizing a Swiss decree of annulment see PERASSI, 25 Rivista (1933) 473.

⁴⁶ App. Milano (June 27, 1933) Giur. Ital. 1933, IV, 222, 25 Rivista (1933) 260; cf. FEDOZZI 456; App. Torino (March 1, 1937) Giur. Ital. 1937, I, 2, 212, Clunet 1938, 929; Cass. (June 11, 1934) Foro Ital. 1934, I, 1061; App. Trieste (Nov. 29, 1934) Clunet 1937, 165. An ecclesiastical tribunal is a court: RG. (Dec. 16, 1920) Warn. Rspr. 1921, no. 35.

effective, change of domicile by the parties does not create international jurisdiction for annulment.⁴⁷

Where a foreign annulment based on the incapacity of a party has applied a law other than the national law of the party, the court of the national country, following the principle of nationality, will not recognize the decree.⁴⁸ But it will, if the legal provisions are fairly similar.⁴⁹

A curious combination of recognition and exclusive jurisdiction is illustrated by an Austrian case of 1937.⁵⁰ The marriage of an Austrian with a Yugoslav woman was annulled by the competent ecclesiastical court in Yugoslavia. The Austrian court found that the decree was to be recognized under the treaty existing between the two countries. But to satisfy formally the constant axiom that the Austrian courts have exclusive jurisdiction over the status of nationals, the marriage was again annulled. This recalls certain duplications of divorce, such as in Michigan.⁵¹

IV. EFFECTS OF ANNULMENT

1. Partly Effectual Void Marriage

A delicate question concerns the phenomenon that a void or annulled marriage may nevertheless produce legal conse-

⁴⁷ App. Genova (Aug. 11, 1936) *Monitore* 1937, 237, *Clunet* 1937, 910.

⁴⁸ Italy. Cass. (June 11, 1937) *Foro Ital.* 1937, I, 1371.

⁴⁹ App. Trieste (Sept. 17, 1936) *Monitore* 1937, 17, *Clunet* 1937, 389 (decree of Lima, Peru, annulling the Italian marriage of two Italians on the ground of impotence according to the Peruvian C. C. (1851) art. 167, art. 107 of the Italian C. C. being similar "in substance"). While Swiss nullity decrees based on impotence are also generally recognized, in the case of App. Milano (May 28, 1936) *Monitore* 1936, 456, *Clunet* 1937, 164, recognition was refused for other reasons, among which was the fact that the allegedly incapable woman had a living child; in this respect an element of re-trial entered under the guise of public policy. *Contra*: Cass. civ. (June 11, 1937) *Giur. Ital.* 1937, I, 1, 762; and see on the problems involved, PAGANO, Note to Cass. civ. (April 17, 1939) *Giur. Ital.* 1939, I, 1, 705; App. Bologna (Jan. 16, 1939) *Giur. Ital.* 1939, I, 2, 309.

⁵⁰ OLG. Graz (March 31, 1937) 55 *Zentralblatt* (1937) 437 no. 248.

⁵¹ See *supra* pp. 404, 520, n. 16.

quences. There are institutions marking a middle ground between valid and invalid marriages; the most widely known and, indeed, the most benevolent⁵² of them is the French *mariage putatif*, which has its roots in the canon law and its ramifications in numerous jurisdictions including Louisiana,⁵³ Quebec,⁵⁴ and Latin America.⁵⁵ Yet French writers and courts disagree hopelessly on the proper conflicts rule.

Illustration: In the case of *Stephens v. Falchi*, which came up in Quebec,⁵⁶ the parties were domiciled and married in Montreal and divorced in a French court. The woman then married in Paris an Italian, Falchi, who was domiciled in Italy. A marriage settlement was expressly made subject to Italian law. The Stephen divorce was invalid under the law of Quebec (and, hence, also in Italy). Therefore, the second

⁵² French C. C. art. 201 declares that marriage that has been declared null produces nevertheless civil effects as regards both the spouses and their children when contracted in good faith. According to art. 202, if only one of the spouses acted in good faith, the marriage produces its civil effects only in favor of this spouse and the children born of the marriage. This provision goes so far as to treat the protected persons as though the marriage were valid. Furthermore, it includes all possible defects of marriage and even non-existent marriages; see Cass. (req.) (March 14, 1933) D.1933.1.28, Gaz.Pal.1933.1.966; cf. for an invalid ceremony before an English consul, Cour Paris (Jan. 16, 1895) Clunet 1895, 1057, and for bigamy, Trib. civ. Seine (May 11, 1933) Gaz. Pal.1933.2.202; Trib. civ. Seine (Nov. 25, 1936) Nouv. Revue 1937, 85; Cour Paris (March 30, 1938) Nouv. Revue 1938, 353. In the case of a marriage of Canadians from Quebec before a Catholic priest in France, see Berthiaume v. Dastous [1930] A. C. 79, *supra* p. 212; cf. LEE, "Cases on the Conflict of Laws from the Law Reports of the British Dominions (1935-1937)," 21 Journ. Comp. Leg. (1939) 28. Finally, good faith is presumed; cf. BAUDRY-LACANTINIERE, 1 Précis 229 No. 478; BINET on Cass. (civ.) (Nov. 5, 1913) D.1914.1.281. To contrary effect, e.g., the Belgian Rb. Antwerp (Oct. 28, 1939) Rechtsk. Wkbl. 889 no. 146, declares that a non-recorded religious marriage between Polish Jews in Warsaw is non-existent and does not produce the protection under C. C. art. 201.

⁵³ La. Rev. Civ. C. Ann. (1932) arts. 117, 118 identical with French C. C. arts. 201, 202.

⁵⁴ C. C. Lower Canada: arts. 163, 164.

⁵⁵ See on the law of Chile, with comparative notes, R. M. ECHAVARRÍA, "Apuntes sobre el matrimonio putativo y la bigamia," 34 Revista Der. Jur. y Ciencias Soc. (1937) part 1, 37.

⁵⁶ *Stephens v. Falchi* (Queb. K. B.) [1937] 3 D. L. R. 605, aff'd by Sup. Ct. of Canada [1938] S. C. R. 354; cf. LEE, 21 Journ. Comp. Leg. (1939) 28, *supra* n. 52.

marriage was "annullable."⁵⁷ Suppose it was annulled. Should the provisions of the French, the Italian, or the Quebec statutes be applied to determine whether the second husband married in good faith, and whether he could sue for the usufruct arising from the settlement?

Are there no such questions in the common law countries? In England, in fact, there are none, since an annulment of a marriage seems to annihilate all its effects. The courts of many of the states of the United States, however, have the power, by or without a statute, to grant alimony or compensation in the decree of annulment and to dispose of the property of the spouses "as in divorce."⁵⁸ It has probably never been doubted that such powers are to be exercised exclusively in accordance with the rules of the forum, even when the voidness of the marriage was based on the fact that the parties had gone through a formally defective marriage ceremony in Louisiana or that one of them had been incapable of marrying as a domiciliary of Louisiana.

In both England and the United States, however, problems of conflicts law have arisen with respect to the legitimacy of children born of void marriages.⁵⁹

On the effects which a putative marriage exercises on the personal rights and duties of husband and wife, the following theories have been advanced by writers and adopted by courts on the Continent and especially in France:

(a) The personal law should govern, a theory that comprises several propositions:

(i) If both parties are nationals of the forum, the law of the forum should be applied under all circumstances.⁶⁰ The

⁵⁷ Because the marriage never was annulled, the court awarded the usufruct flowing from the marriage settlement according to Italian law, upon a complete, though unconvincing, reasoning under the French law of the place of celebration. It is not clear why the doctrine of putative marriage is also mentioned.

⁵⁸ See 1 VERNIER § 53.

⁵⁹ See *infra* n. 73.

⁶⁰ Cass. (civ.) (March 25, 1889) Clunet 1889, 642 and other decisions; see VALÉRY 1076 no. 750.

same should be done, if the personal law of both spouses contains rules approximately similar to the *lex fori*.⁶¹

(ii) In mixed marriages, the old rule that the law of the husband governs the personal marital relations has been extended to questions of what effects of marriage survive an annulment.⁶²

(iii) According to another opinion, where one party is a French national, this party should always enjoy the far-reaching benefit of the French Civil Code, article 299.⁶³ In a generalized and now widely adopted version, a party having married in good faith enjoys the benefit which may be granted to him by his national law.⁶⁴

(b) Some courts have applied the law of the forum "for reasons of justice and good morals"⁶⁵ or without any justification.⁶⁶

⁶¹ App. Alger (June 28, 1887) Clunet 1889, 616, Trib. civ. Seine (June 16, 1906) Clunet 1907, 142; App. Agen (July 29, 1936) Revue Crit. 1937, 721.

⁶² App. Alger (May 26, 1879) D.1880.2.161, App. Orléans (Jan. 10, 1894) Clunet 1894, 536; Cour Paris (Aug. 3, 1898) Clunet 1898, 1080, PILLET, 1 Traité 566 no. 268; NIBOYET 737 no. 627, CUNHA GONÇALVES, 1 Direito Civil 687. *Contra*: 2 ARMINJON 460 reproaches the writers that they forget that the existence of a marriage is precisely in question. But see the text against this pseudo-logic.

⁶³ VALÉRY 1076 no. 750; AUDINET, Clunet 1930, 322; NIBOYET, Revue Crit. 1934, 134.

⁶⁴ WAHL, Note to Cass. (civ.) (July 30, 1900) S.1902.1.225; cf. App. Alger (May 26, 1879) S.1879.2.281; Trib. civ. Seine (May 11, 1933) Revue Crit. 1934, 129; Trib. civ. Seine (Nov. 25, 1936) Revue Crit. 1938, 84 (expressly against the *lex fori* and the *lex loci celebrationis* and for the personal law); BARTIN, 2 Principes 212 § 291; LEREBOURS-PIGEONNIÈRE 389 no. 331; in Italy, FEDOZZI 455.

⁶⁵ App. Aix (Feb. 13, 1912) Clunet 1913, 1229; Trib. civ. Tunis (June 14, 1906) Clunet 1907, 439; and a general trend described by BATIFFOL, Revue 1937, 433.

⁶⁶ Trib. civ. Seine (June 28, 1913) Clunet 1916, 170; Trib. civ. Seine (Jan. 10, 1912) Clunet 1916, 178; Cour Paris (Nov. 12, 1913) Clunet 1916, 178; Trib. civ. Seine (Feb. 22, 1937) Revue Crit. 1937, 650 (Orthodox Serb and French woman married in Serbia by Catholic priest; on the lack of motivation see BATIFFOL, Revue Crit. 1937, 432); Cour Paris (March 30, 1938) Revue Crit. 1939, 119 (Italian wife, later of French nationality).

Belgium: Trib. civ. Antwerp (July 7, 1932) 19 Bull. Inst. Belge (1933) 174 (lack of consent by the English father of the bride).

Brazil: Sup. Trib. Fed. (April 12, 1933) 28 Arch. Jud. 456 in the case of a Brazilian woman separated by judicial decree, marrying in New York an Eng-

(c) A theory allegedly flowing from general principles, and for this reason preferred by recent German writers, considers that the law violated by the attempted marriage is the naturally competent law to determine what legal effects are left to the apparent conclusion of the marriage.⁶⁷

As a matter of fact, the French courts have always found a ground for applying the French provision in favor of a French party, unless his or her bad faith was proved or both parties had fraudulently evaded the French marriage requirements, in which case good faith was considered absent.⁶⁸ This practice involves exaggerated protection of nationals and is a measurably excessive extension of public policy to an ordinary rule of private law, as Battifol has pointed out.⁶⁹

A suitable theory may perhaps be derived from the opinion described under (a), (ii), referring to the law of the husband. We should, however, consider on the one hand that the conflicts rules by no means have to be identical for personal relations between husband and wife (maintenance, name of the wife, alimony), property relations, custody of children, and succession on death.⁷⁰ On the other hand, the protection which the French, German, Swiss, and other systems in varying degree grant to an innocent pseudo-spouse should be technically

lishman, held that she and her issue were not entitled to any rights of putative marriage, because she must have known her disability to remarry (this result could be reached in several ways). An analogous case of a Brazilian woman was decided to the same effect by Trib. civ. Seine (June 28, 1913) *Clunet* 1916, 170.

⁶⁷ *CHAMPCOMMUNAL*, *Revue* 1910, 56; 2 *ARMINJON* 460; *AUDINET*, 11 *Recueil* 1926 I 175 at 210 and in *Clunet* 1930, 322; *Cass. (civ.)* (July 30, 1900) D.1901.1.317, S.1902.1.225.

Germany: *KIPP-WOLFF*, *Familienrecht* (1928) § 39 A III at 144, and *M. WOLFF*, *IPR.* 122; *RAAPE* 339, 451; rejected by the *Reichsgericht* (Nov. 11, 1937) *JW.* 1938, 108 *infra* n. 73.

⁶⁸ *Cour Paris* (Aug. 3, 1898) *Clunet* 1898, 1080.

⁶⁹ *BATIFFOL*, *Revue Crit.* 1937, 432. To the opposite effect, § 1344 of the German BGB. is believed of public order by *RAAPE* 340; *WIERUSZOWSKI* in 4 *Leske-Loewenfeld* I 55; *M. WOLFF*, *IPR.* 122.

⁷⁰ See 2 *ZITELMANN* 751 and 3 *FRANKENSTEIN* 217 (not one but several different "statutes"). But for property relations, the latter (3 *FRANKENSTEIN* 396), like his adversary, *RAAPE*, 340, applies a separate personal law of the wife in contradiction to the German Code, EG. art. 15.

construed as a residuum from the parties' attempted marriage, some shelter left in the ruins of the house. The benefit to that party is not so much an effect of the violation of prescriptions, as suggested in connection with the opinion under (c), as it is an effect of the marriage despite its "nullity." We may observe generally that what in legal terminology is called void may nevertheless have some effects. Such rudimentary consequences, however, must lie within the framework of the normal effects which the transaction would have had if it had been valid.⁷¹

Hence, it is submitted that all relations between the parties should be determined by the law that would have been applied to the respective kind of relation, had the marriage been valid.⁷² Consequently, in common law countries the personal relations of the parties should be treated according to the law of the domicil on the ground of which jurisdiction has been assumed. Suppose a party to a marriage celebrated in Louisiana was under age and the marriage therefore void, either because the party was domiciled at the time in Louisiana or because of the law of his or her domicil applied by Louisiana according to its domiciliary principle. The personal relations of the parties have to be treated without regard to the Louisiana doctrine of putative marriage, if the marriage is annulled in a common law state where the parties are now domiciled. This solution agrees with the result of a *lex fori* theory but is based upon the *lex domicilii* as governing the personal effects of marriage. With respect to movables, the law obtaining at the domicil when the movables were acquired governs, as it would if the marriage were valid, in favor of the party acting in good faith, *et cetera*.

⁷¹ See my construction of "damages from reliance": RABEL, "Der sogen. Vertrauensschaden im schweizerischen Recht," 27 Z. Schweiz. R., N. F. (1908) 291ff.

⁷² This suggestion seems to agree with some remarks of DIENA, 2 Princ. 156 and UDINA, Elementi 180 no. 130.

The status of children born of void marriages must certainly be treated under the law governing legitimacy⁷³ (unless a special rule is devised as in the *Código Bustamante*),⁷⁴ and the share which a pseudo-spouse may be allotted in the distribution of assets of the other party is governed by the rules on inheritance.⁷⁵ Whether an innocent wife may also acquire the nationality of the husband by a putative marriage is a matter of public law, but in France it seems by prevailing opinion to be included in the "civil effects" of marriage.⁷⁶

2. Protection of Third Parties

Under a probably general American rule, a man is liable for necessities furnished to a wife to whom he is not legally married, if he lived with her and held her out to the world as his wife.⁷⁷ The conflicts rule on necessities, as stated in section 459 of the Restatement, recognizes an implied authorization by the husband, either as part of the law of the man's domicile or under circumstances defined by the law of the state where the necessities are furnished. Is this rule applicable also if

⁷³ The United States: Restatement § 137 and comment; *Moore v. Saxton* (1916) 90 Conn. 164, 96 Atl. 960; *Green v. Kelley* (1917) 228 Mass. 602, 118 N. E. 235; *McNamara v. McNamara* (1922) 303 Ill. 191, 135 N. E. 410. Cf. on the statutory provisions declaring legitimate the issue of prohibited marriages 1 *VERNIER* § 48; 4 *ibid.* § 247.

England: The rule would be the same if *Shaw v. Gould* (*In re Wilson's Trusts*) (1865) L. R. 1 Eq. 247 had not partly disturbed the doctrine; *CHESHIRE* 387 asks for overruling and *FOSTER*, "Some Defects in the English Rules of Conflict of Laws," 16 *Brit. Year Book Int. Law* (1935) 84, 89 for a reform law.

Germany: RG. (Nov. 11, 1937) JW. 1938, 108 (against RAAPE 451); KG. (July 9, 1937) JW. 1937, 2526, Clunet 1938, 341; also KG. (Dec. 9, 1921) 42 ROLG. 97; KG. (Feb. 27, 1931) IPRspr. 1931, no. 83: they apply the law governing filiation, i.e., EG. arts. 18 and 19.

⁷⁴ *Código Bustamante* art. 49 as compared with art. 57.

⁷⁵ See *supra* p. 376.

⁷⁶ A contrary decision of Trib. civ. Boulogne (Dec. 20, 1935) Clunet 1936, 375 was reversed by App. Douai (April 1, 1936) D.1936.2.70, with note by ROUAST; *Revue Crit.* 1937, 75, with note by CALEB at 78; see also VALÉRY 237 no. 200; NIBOYET 194 no. 147; LEREBOURS-PIGEONNIÈRE 124 no. 104.

⁷⁷ *Frank v. Carter* (1916) 219 N. Y. 35, 113 N. E. 549; *Jordan Marsh Co. v. Heddler* (1921) 238 Mass. 43, 130 N. E. 78.

the man is not a husband legally? No reason seems to exist why the answer should not be in the affirmative.

A related question was prompted by the provision of the German Civil Code protecting a third person who has entered into a transaction with, or obtained a judgment against, a spouse of a void marriage. The nullity cannot be set up to defeat his rights, if it was not pronounced in a judgment and was unknown to him (BGB. § 1344, German Marriage Law of 1938, § 32). It has been suggested in Germany that this domestic provision be extended by analogy to international situations, i.e., where German spouses have celebrated an invalid marriage abroad and live in the forum, or foreign spouses whose marriage is void under their national law are domiciled in the forum.⁷⁸ Third parties should be protected against the effects of a nullity not stated in a judgment and unknown to them.

⁷⁸ M. WOLFF, IPR. 122 IV.

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PART FIVE

PARENTAL RELATIONS

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CHAPTER 15

Parent and Child¹

I. PRELIMINARY OBSERVATIONS

1. Subject Matter

AFTER dealing with marriage and divorce rules, American case books on conflict law and the Restatement finish the chapter on family or status law with the four topics of legitimacy, adoption, custodianship of parents, and guardianship. We shall see, as we have seen in considering the subject of marriage relations, that the relationships created by legitimate birth, legitimation, and adoption have a broader scope in the civil than in the common law. For instance, under the civil law, support is an important incident of legitimate as well as of illegitimate relationship and is governed in principle by the personal law, while in the Restatement it is treated separately and left to the law of the forum. To do justice to all legislations, we have to divide the matter into smaller topics, viz., in the first place, (i) legitimate birth, (ii) legitimation, (iii) rights and duties of legitimate parents, (iv) adoption, and (v) illegitimacy. On the other hand, custodianship, which in the common law is the inclusive and essentially homogeneous repository of all rules concerning infants, must, for the purposes of our survey, be subdivided into two different parts. Family law principles are embodied in

¹ Among the special articles on the subject reference will be made more particularly to RAAPE, "Rapports juridiques entre parents et enfants," 50 *Recueil* 1934 IV 405, and to TAINTOR, "Legitimation, Legitimacy, and Recognition in the Conflict of Laws," 18 *Can. Bar Rev.* (1940) 589, 691.

For a comparative survey of the municipal laws, see VEITH, *Kindschaftsrecht*, 4 *Rechtsvergl. Handwörterb.* 770; for materials, vols. 1 and 2 of BERGMANN'S work.

the rules that determine the rights and duties of parents as such, while the constitution of other guardians and the management and supervision of the estate of a child or any other ward may be better treated in connection with the administration of other estates. Our discussion, therefore, will be limited to the matters more closely allied with the special consideration of family law.

The existing written conflict rules differ, as in other respects, also with respect to their subject matter. While, for instance, the recent Italian code contains one provision on the relationship between parent and child,² the German Introductory Law³ has different provisions relating to (1) legitimacy as the origin of legitimate relationships, (2) the relationship between parents and a legitimate child, (3) the relationship between an illegitimate child and his mother, (4) the duties of support of the illegitimate father, (5) legitimation and adoption, and (6) custodianship of all kinds. And, whereas Germany treats legitimation and adoption together,⁴ Poland joins legitimation and recognition,⁵ Switzerland legitimation, recognition, and adoption,⁶ and the *Código Bustamante*,⁷ as well as the recent Greek code,⁸ have one rule on legitimation alone.

2. Institutions Involving an Act of a Party

(a) In some statutes of this country, the term, adoption, is given to the institution otherwise known as legitimation by voluntary declaration. Moreover, legitimation in the proper sense is often confused with the qualified recognition by a parent through which an illegitimate child obtains an ameli-

² C. C. (1942) Disp. Prel. art. 20 par. 1.

³ EG. arts. 18-23.

⁴ EG. art. 22.

⁵ Law of 1926 on international private law, art. 22; cf. China: Law of 1918, art. 13; Japan: Law of 1898, art. 18.

⁶ NAG. art. 8.

⁷ Arts. 60-62.

⁸ C. C. (1940) art. 22.

orated position, although remaining illegitimate. Also, in some other countries, the terminology oscillates. In fact, there are in this field many institutions of mixed character existing in the world. For the purpose of the law of conflicts, however, it is of primary importance to distinguish the following groups of institutions:

(i) Acts through which an illegitimate child receives the full status of legitimacy (legitimation in the ordinary sense).

(ii) Acknowledgment of paternity or maternity whereby (as by certain other circumstances) an illegitimate child may receive an improved position without reaching the full position of a legitimate child. This group includes very different degrees of position. The child may be assimilated to a legitimate child in most respects, or it may, on the contrary, be granted only particular prerogatives, as under those numerous statutes of the United States which confer nothing but rights of inheritance upon a recognized child.⁹

(iii) Recognition as a condition for any effect of illegitimate filiation as required in the French and in the other legislations following the French system.

(iv) Institutions of a still more restricted nature such as the faculty of the husband to give his name to an illegitimate child of his wife under Austrian and German laws.¹⁰

(b) The broad distinction between legitimate and illegitimate children is considered fundamental, legally as well as socially, except in a few countries. It would seem natural, therefore, that the same conflict rules should govern legitimacy by birth, legitimation, and adoption, insofar as by these institutions the full degree of legitimacy is reached. On the other hand, we can understand that conflict rules with respect to illegitimacy are different from those governing legitimacy

⁹ See, for instance, *Pfeifer v. Wright* (1930) 41 F. (2d) 464; *cf.* Note, 29 Mich. L. Rev. (1930) 258.

¹⁰ Austria: Allg. BGB. § 165 par. 2; Germany: BGB. § 1706 par. 2, see *infra* p. 612, n. 11.

by birth. However, existing rules do not altogether agree with these simple distinctions.

(c) Recognition of foreign institutions has been strongly influenced by some aprioristic doctrines:

(i) The influential English doctrine that a status unknown to the forum cannot be recognized has considerably impeded the progress of reciprocal recognition of institutions regarding parent and child. As stated in our general discussion in Chapter 5, the hope is justified that this doctrine may be considered overruled.¹¹

(ii) American courts are inclined to recognize foreign acts but to give them the same effect as ascribed to the most nearly related domestic institutions. This doctrine is preferable to the English rule just mentioned, but it too is unsatisfactory. By such an approach, e.g., a child, illegitimate abroad, has been treated as legitimate at the forum for purposes of inheritance.

(iii) The idea mentioned under (ii), inexact in application to illegitimacy, is perfectly right with respect to legitimacy. In the various countries, the status of legitimate children, though qualified by different minor features, is regulated in an essentially similar manner so far as the personal relations between parent and child are concerned. Hence, recognition of a foreign created legitimacy means that a child born or legitimated or adopted in one country will be treated as legitimate in another, with the incidents determined by the law of the forum. This means also that, if the domicile or the nationality determinative of personal status is changed, the rights of legitimate parents and children are transformed accordingly. This mutability of parental relations is a phenomenon that has only begun to attract some attention.¹²

¹¹ *Supra* pp. 175-178.

¹² RAAPE 464 III 1. Application to English law has been attempted by MANN, "Legitimation and Adoption in Private International Law," 57 Law Q. Rev. (1941) 112, 126.

3. Liberal Trends

Recently, some well-meaning courts and writers have tried to counteract the narrowness of traditional doctrines. Thus, it has been postulated that the personal law of the child should govern rather than that of the parent,¹³ or that public policy should override any conflicts rule referring to a foreign law less favorable to legitimacy than the domestic law.¹⁴ But the advantage of the child can only be secured by a conflicts rule that directly refers to that law most favorable to the child in each particular case. Conflicts rules formulated in this manner¹⁵ have proved to be of difficult application in German law.¹⁶ Moreover, consideration of family policy should be left to substantive legislation, except in a very restricted domain of public policy, where courts consider foreign bastardy statutes as plainly backward and a disgrace to the law.

II. LEGITIMATE BIRTH

A. RULES

I. Personal Law of the Parent

Common law and civil law agree in submitting the question of birth in lawful wedlock to the personal law of the parent. The tests are domicile or nationality respectively. American law, however, disagrees with all others by the distinctly proclaimed principle of determining the child's legitimate relationship to each parent separately.¹⁷ In fact such an equal position of men and women, although apt to create complicated situations with respect to the child, may be considered fair to all parties. In other countries, however, the law of the male parent is applied to determine the legitimate relation-

¹³ See *infra* p. 561.

¹⁴ TAINTOR, 18 Can. Bar Rev. (1940) at 700, 701, *supra* n. 1; cf. *ibid.* 715.

¹⁵ Poland Law of 1926 on international private law, art. 21 par. 2.

¹⁶ See RAAPE 211 ff., 359 ff. on EG. arts. 12, 16, par. 2.

¹⁷ Restatement § 137, cf. *ibid.* § 138.

ship also between mother and child in order to maintain the unity of the family and particularly in view of the consequences for the nationality of the issue.

The head of the family whose law governs legitimacy is, in the German law, correctly characterized as "the husband of the mother." To say that legitimacy is predicated on the personal law of the "child's father" is a tautology that has caused confusion to English writers.¹⁸

Hence, under American law, if the parents are domiciled in different states at the time of the birth of the child, the law of each party's domicile decides his relationship to the child. Where, for instance, the marriage of the parents is recognized as valid in Iowa and considered invalid in New York, the child is legitimate as to the mother, domiciled in the first state, and illegitimate as to the father, domiciled in the second state. Under English law, the child would be illegitimate with regard to both parents.

Contacts: domicile or nationality. The domicile of the father or mother is the test in the United States. The domicile of the father, as head of the family, is the test in England and the other countries generally following the domiciliary principle.¹⁹

Nationality of the mother's husband is decisive almost everywhere in the rest of the world.²⁰ The personal law has

¹⁸ CHESHIRE 380, caught in that tautology which he believes to be a "theory," feels compelled to state that "practicability must not be sacrificed to theory."

¹⁹ England: CHESHIRE 376.

Argentina: 2 VICO no. 140.

Denmark: BORUM and MEYER, 6 Répert. 220 no. 52.

Nicaragua: C. C. Tit. Prel. art. VI (9).

The Treaty of Montevideo on international civil law starts pronouncing in art. 16, unchanged by the text of 1940, art. 20, that "the law that governs the celebration of the marriage determines legitimate birth and the legitimation by subsequent marriage." However, the next section (art. 17, text of 1940: art. 21) submits "the questions of legitimacy other than those concerning the validity or nullity of the marriage" to the domiciliary law. This means probably that art. 16 is corrected by art. 17; the special rule on marriage, as in the other countries, governs only the question whether the marriage, or subsequent marriage, is valid. This seems to be the opinion also of 2 VICO, no. 174. But why has art. 16 not been cancelled at least in 1940?

to govern because the stability of the family, the honor of the married woman, and her marital rights stand upon this matter.²¹ An exorbitant exception in favor of the *lex fori* is made by a National Socialist law of 1938 that extends the application of the German laws to the contestation of legitimacy in the case where only the mother is of German nationality at a certain date.²²

Renvoi is applied according to general rules.²³

2. Personal Law of the Child

The personal law of the child has been advocated by a few writers,²⁴ although sparsely applied in actual laws.²⁵ According to this opinion, it would be material in this country whether the child's domicil at birth is with the father or the mother.²⁶ In a country following the principle of nationality, the child's

²⁰ Austria, prevailing opinion, WALKER 782 n. 11 (the Austrian law of parent and child seems to have stayed in force).

Belgium: POULLET 506 no. 387.

Belgian Congo: C. C. (1895) book 1, art. 12.

Finland: Law of 1929, § 18.

France: prevailing opinion.

Germany: EG. art. 18.

Greece: C. C. (1940) art. 17 par. 1.

Italy: C. C. (1942) Disp. Prel. art. 20 par. 1.

Switzerland: NAG. arts. 8 and 32 (for Swiss domiciliaries).

China: Law of 1918, art. 12.

Japan: Law of 1898, art. 17.

Poland: Law of 1926 on international private law, art. 18.

²¹ LEREBOURS-PIGEONNIÈRE 410 no. 346.

²² Cf. EG. art. 18 par. 2, added by art. 2 § 8 of the Law of April 12, 1938, to modify and complete family law provisions and on the condition of apatrides (RGBl. I, 380).

²³ Germany: RAAPE 487 whose illustration however is questionable; M. WOLFF, IPR. 135 no. 6.

²⁴ France: WEISS, 4 *Traité* 27; AUDINET no. 625; see *contra*: SURVILLE 447 no. 305; DUGUIT, *Clunet*, 1885, 353, 359; CHAMPCOMMUNAL, *Revue* 1910, 57, 61.

Belgium: see ROLIN, 2 *Principes* 137 no. 613; POULLET 506, no. 387; *Novelles Belges*, 2 *D. Civ.* 618 no. 581.

²⁵ Código Bustamante art. 57. Art. 8 sentence 2 of the French law of July 24, 1921 concerning the conflicts law of Alsace-Lorraine, refers to the law of the child the "proof of filiation," whatever that means. Two decisions of the court of Bucharest to this effect, conflicting with others, are cited by PLASTARA, 7 *Répert.* 68 no. 198.

²⁶ TAINTOR, 18 *Can. Bar Rev.* (1940) at 597, *supra* n. 1; cf. *ibid.* 602.

national law cannot be found without knowing whether it is legitimate; thus nationality would depend upon legitimacy, and this again upon nationality. Such a vicious circle, it is true, may be avoided by legislation on nationality whereby the child acquires a nationality of its own on the ground of *jus soli* or a temporary nationality which may suffice for provisional legal situations. It must be conceded, furthermore, that the traditional system based on nationality is weakened to the extent that separate nationality of wife and child has been recognized. But the idea of applying the child's law instead of that of the parent seems to come simply from the desire to employ in the forum of the child once more the law of the forum.²⁷ It is still the dominant opinion that the child's domicile or nationality is perfectly immaterial,²⁸ the reason still proclaimed being that the existence and unity of the family is at stake.²⁹

Indeed, if the state of the child's domicile is said to have a concurrent interest in its status,³⁰ this interest is negligible compared with the interest of the family. Moreover, the interests of the child are not, and certainly should not be, more protected by the court of his domicile than by any other. And the law of his domicile may as well be unfavorable to the child as favorable.

3. Time Governing Ascertainment of Applicable Law

The decisive and natural time for determining the applicable law is considered to be the moment when the child is born. In the German and other enactments, it is added that, if the child is born after the death of the mother's husband, the personal law of the husband at the time of his death gov-

²⁷ See e.g., LEREBOURS-PIGEONNIÈRE 415 no. 349 (B).

²⁸ Germany: unanimous opinion, see RAAPE 447; Bay. ObLG. (March 22, 1924) 23 Bay. ObLGZ. 56.

Switzerland: BG. (June 29, 1928) 54 BGE. I 230.

²⁹ DIENA, 2 Princ. 179; RAAPE 447.

³⁰ TAINTOR, 18 Can. Bar Rev. (1940) at 603, *supra* n. 1.

erns; ³¹ in a generalized version, the same rule applies in the case of any dissolution of the marriage occurring before birth.³²

It follows that the law determining whether a child is legitimate is immutable; no change of status of parent or child after this date alters the result. This is in sharp contrast to the fact that a voluntary change of status elected by the husband before the child's birth may influence its legitimacy.

Precisely in view of this liberty of the father, occasionally the decisive time has been assumed to be that of the conception rather than that of the birth,³³ a solution generally held impractical, because birth can be ascertained much more easily than conception.³⁴ But an American author ³⁵ has recently suggested that "the rule should be stated in terms of the creation of legitimacy by the law of the domicile of the parents either at conception or birth of the child." He thinks that the writers and the courts have been wrong in regarding only the time of birth or have overlooked the possibility of the parents' change of domicil between conception and birth of the child. Yet, no mistake has occurred in the formation of the rules. The purpose of conflicts law is not the same as that of substantive private laws. These may consider a child born during the time of wedlock as legitimate (as common law does) or declare a child *en ventre sa mère* as already born inasmuch as this fiction is advantageous to the child (as Roman law does). Conflicts law refers to one legislation and leaves it to this legislation whether to go back from birth to con-

³¹ Germany: EG. art. 18.

Poland. Law of 1926 on international private law, art. 18 par. 2.

China: Law of 1918, art. 12, 2nd sentence.

Japan: Law of 1898, art. 17, 2nd sentence.

³² Greece. C. C. (1940) art. 17 par. 2, in agreement with the German interpretation of EG. art. 18; cf. RAAPE 449.

³³ Denmark: App. Copenhagen (July 17, 1916) 2 Zausl.PR. (1928) 866 no. 7. SURVILLE 447 no. 305 advocates a fiction of earlier birth where it would be more favorable to the child; RAAPE 448 would like an exception to the rule in the case of a fraudulent change of nationality.

³⁴ SCHNITZER 203, concerning Swiss law.

³⁵ TAINTOR, 18 Can. Bar Rev. (1940) at 597, *supra* n. 1.

ception. The suggested terms would essentially modify the rule; this seems inadvisable, if for no other reason than because of the wide uniformity already reached. Moreover, the law of the time of birth has been adopted in the different legislations, because this is a fact that can be ascertained without any fiction.

4. Soviet Russia

The law of Soviet Russia knows only one category of parent-child relations: it does not admit any difference between legitimate and illegitimate children.³⁶ How, therefore, ought we to classify in a Western court children whose parents were domiciled in or nationals of, Soviet Russia? Are they to be regarded without distinction as legitimate or illegitimate?³⁷ The second answer is absurd, and, since the Russian law intends to abolish the category of illegitimate children, the solution must be the same as in the case of the statutes of Arizona and North Dakota which declare all children the legitimate offspring of their natural parents.³⁸ In the latter case, indeed, there is no doubt regarding the effects in a foreign court.

³⁶ Soviet Russian Code of family law of 1926, art. 25.

³⁷ The question has been discussed with reference to legitimation by the writers cited *infra* p. 578, ns. 113, 114.

³⁸ Arizona: Ariz. Code Ann. (1939) § 27-401; North Dakota: Comp. Laws Ann. (Supp. 1925) § 10500b1 (Laws 1917, Ch. 70 § 1). See comment to the first in Fladung v. Sanford (1938) 51 Ariz. 211, 75 P. (2d) 685; Hazelett v. State (1940) 55 Ariz. 141, 99 P. (2d) 101. The authors of the official Supplement to the 1913 Comp. Laws of North Dakota, 1913-1925, vol. III p. 1496, assert that Chapter 5B consisting of Laws 1917, Ch. 70 "was evidently intended to be repealed" by the Uniform Illegitimacy Act, consisting of Laws 1923, ch. 165 (§§ 10500a1-10500a37 of the Compiled Laws 1925). This change would be exactly inverse to the Arizona legislation having adopted first the Uniform Illegitimacy Act and then replaced it by the acknowledgment of all illegitimate children. This mystery should be removed by the legislature of North Dakota.

B. SCOPE OF THE RULES

1. Validity of Marriage as Condition

The first condition for legitimacy by birth is normally a valid marriage between the mother and the man alleged to be the father. Validity of the marriage, therefore, is a "preliminary question" in examining legitimacy according to the law governing lawful birth. But this law does not extend to the validity of the marriage. It is universally agreed that the law governing the formal and the intrinsic validity of marriage according to the rules discussed above in Chapters 7 and 8 are applicable also to this question. Even the writers who regularly assign preliminary questions to the law governing the principal question agree that marriage is always, without exception, tested according to its own particular rule of conflicts.³⁹

A remarkable consequence occurs where a foreign marriage is regarded as valid under the main conflicts rule of the forum. Children born of such a marriage are considered legitimate, even if the personal law of the parents at the time of the birth considers the marriage invalid.⁴⁰ For illustration, if two Greeks, being of Orthodox faith and domiciled in Greece at the birth of a child, had gone through a temporal marriage ceremony in Paris, the marriage, though considered invalid in Greece, is recognized as valid in most countries; in the latter countries, the children must, therefore, be considered legitimate, provided that they would be so under Greek family law if the marriage had been celebrated by a Greek Orthodox priest.

There are complications also on the opposite side of the problem. The forum may regard a marriage as invalid either

³⁹ MELCHIOR 259 § 173, WENGLER, 8 Z.ausl.PR. (1934) 148, 206 (with different explanations).

⁴⁰ WENGLER, 8 Z.ausl.PR. (1934) 148, 214.

in accordance with the law governing marriage, for instance because formalities are lacking,⁴¹ or despite this law for reasons of public policy respecting polygamy, incest, or adultery. We might well question the wisdom of holding a Chinese marriage of Chinese domiciled persons invalid for local purposes as being polygamous; but if we do so, the marriage cannot be regarded as valid for the purpose of personal relations. Even if the law governing legitimacy (for instance the law of the parent's domicile at the time of the birth) recognizes such a marriage, the special conflict rules on marriage prevail.

The situation is different, of course, where the law governing the problem of legitimacy accords legitimacy without a valid marriage.⁴² This situation will be considered later.⁴³

2. Presumptions of Legitimacy

The well-known presumptions for establishing birth in lawful wedlock, which form the main body of the municipal regulations of legitimacy, are not mere rules of evidence; they are substantive law.⁴⁴ This may safely be alleged with respect to any present legislation and seems to be acknowledged almost everywhere. Hence, the law applicable to legitimacy governs the questions at what time, and under what circumstances, the presumption of legitimate birth arises, on what ground the presumption may be rebutted,⁴⁵ within what

⁴¹ A religious ceremony without civil marriage is non-existent in Germany, under EG. art. 13 par. 3. Is the father's national law recognizing the marriage applicable to the parental relations? No: OLG. München (March 10, 1921) 42 ROLG. 98; Yes: KG. (July 9, 1937) HRR. 1937 no. 1446.

⁴² For this reason only, the criticism by 1 FRANKENSTEIN 236 on the decision of OLG. München (precedent note) is justified.

⁴³ See *infra* pp. 568ff.

⁴⁴ France: WEISS, 4 *Traité* 25; LEREBOURS-PIGEONNIÈRE 412 no. 348; BATIFFOL, 8 *Répert.* 412 no. 52.

Germany: RAAPE 460; 4 FRANKENSTEIN 22.

Quebec: Lefebvre v. Digman (1894) 3 *Rev. de Jur.* 194 and others; see 1 JOHNSON 339.

⁴⁵ E.g. OLG. München (May 15, 1933) 29 *Z.Rechtspflege Bayern* (1933) 278; 5 *Giur. Comp. DIP.* 135 no. 48 (the Austrian law of father allows proof of the impossibility of cohabitation, even though he was at the same place as the mother).

period, by whom,⁴⁶ and against whom, legitimacy may be contested or action for a declaratory statement denying legitimacy may be brought; what events terminate the right to disown the child, whether alleged recognition of paternity may be revoked, under what conditions and in what time,⁴⁷ and similar problems. In particular, European courts apply the provision of a foreign personal law to determine the time within which an action for contesting paternity must be brought; for instance, an Austrian⁴⁸ or a Swiss⁴⁹ husband is given a period of three months for this action.

3. Public Policy

Public policy is not interested in regard to the problems just mentioned.

However, as usual, French courts reserve many provisions of their code for imperative application, irrespective of the nationality of the parties. This is done, for instance, with that French rule, which exists also in Louisiana,⁵⁰ that a husband is not allowed to disown a child by alleging and proving his own impotence; such a source of scandal must be closed, the French courts think.⁵¹

⁴⁶ E.g., Swiss BG. (June 20, 1923) 49 BGE. II 317 (children born in Switzerland during the formal existence of their mother's marriage with a German are not entitled to contest their legitimacy, according to the German law of the time).

⁴⁷ One year in Germany (BGB. § 1594 par. 1); six months in Sweden (law concerning legitimate birth of June 14, 1917, § 2); one or two months in Louisiana (Rev. Civ. C. Ann. (1932) art. 191); one month in Turkey (C. C. of Feb. 17, 1926, art. 242); etc.

⁴⁸ Austria: Allg. BGB. § 158; RG. (Jan. 12, 1939) HRR. 1939, no. 376 (4); OLG. Naumburg (Dec. 3, 1936) HRR. 1937, no. 1146.

⁴⁹ Swiss C. C. art. 253; LG. Mainz (June 6, 1926) 41 Z.int.R. (1929) 415, IPRspr. 1929, no. 80. See also KG. (Feb. 28, 1931) JW. 1932, 2296, IPRspr. 1932, no. 89 (father a national of the former Kingdom of Poland). Trib. civ. Bruxelles (April 28, 1910) Pasicrisie 1910. III. 195. Trib. civ. Bruxelles (Feb. 6, 1914) Clunet 1914, 993 (Bavarian, became father in 1893). *Contra*: OLG. Frankfurt (Dec. 3-17, 1925) JW. 1926, 2858, IPRspr. 1926-1927, no. 77.

⁵⁰ La: Rev. Civ. Code Ann (1932) art. 185.

⁵¹ Even in France: WEISS, 4 Traité 23; POULLET 504 no. 386. Many French decisions deal with the form necessary for foreign documents of birth, see J. DONNEDIEU DE VABRES 385.

C. CHILDREN OF INVALID MARRIAGES

(a) *United States: general rule.* Many statutes in the United States legitimize the issue of certain or of all prohibited marriages.⁵² Marriage, in this case, is not a condition precedent to legitimacy. The comments on these statutory provisions have made it perfectly clear that legitimacy is not an incident of marriage, but an independent subject. Hence, the law of the domicile of the parents, whose relationship to the child is in question at the time of birth, determines legitimacy or illegitimacy.⁵³ It is the same conflicts rule as though the marriage were valid.

Sometimes this conflicts solution has been explained as due to the policy of favoring the innocent issue,⁵⁴ which naturally forms the reason of the statutory provisions. This is an erroneous transplantation of social purposes from the substantive law into international private law. The law of the domicile of the parents applicable under our rule may be decidedly more favorable to the child than the law governing the marriage.

(b) *England.* The rule is the same in England with the exception that the House of Lords' decision in *Shaw v. Gould*⁵⁵ has disturbed the problem in the case where a child is born to a marriage not recognized in England, because a previous divorce of one parent is not recognized there. In the

⁵² See 1 VERNIER § 48, 4 VERNIER § 247.

⁵³ Restatement § 137 and comment. *Moore v. Saxton* (1916) 90 Conn. 164, 96 Atl. 960 (bigamous marriage, birth in California); *Green v. Kelley* (1917) 228 Mass. 602, 118 N. E. 235 (bigamy); *Harding v. Townsend* (1932) 280 Mass. 256, 182 N. E. 369 (bigamy); apart from the special rules of New York (discussed below on p. 569) exceptions for public policy are rare, see *Greenhow et al. v. James, Executor* (1885) 80 Va. 636, 56 Am. Rep. 603 (miscegenous marriage).

As to polygamy see TAINTOR, 18 Can. Bar Rev. (1940) at 594, 711 *supra* n. 1.

⁵⁴ Cf. cases cited by TAINTOR, 18 Can. Bar Rev. (1940) at 595, 697, *supra* n. 1.

⁵⁵ *In re Wilson's Trusts, Shaw v. Gould* [1865] L. R. 1 Eq. 247, *aff'd* 1868 L. R. 3 H. L. 55.

case mentioned, the child was declared illegitimate, although the father was domiciled in Scotland at the time of the birth and Scotch law had no objection to legitimacy. This decision has been sharply disapproved by recent English writers. In their opinion, the court should have recognized the legitimacy of the children under Scotch law, while appropriately refusing to recognize the validity of the marriage. Cheshire⁵⁶ suggests that the case should be overruled, while Foster⁵⁷ thinks a statutory enactment is necessary. Against this criticism, American writers have emphasized the interest of the English law in the matter because of the English domicile of the mother.⁵⁸ But under English as well as generally under Continental conflicts rules, the child's relations to both parents are governed by the personal law of the father alone, that of the mother being entirely immaterial.

Also, New York courts have declined to recognize legitimacy under similar circumstances, viz., when, according to the New York "special rule," a foreign divorce and, in consequence thereof, a remarriage was invalid and the child was born during the second marriage.⁵⁹ This evidently must be taken as a part of the general policy of New York courts against marriages that are "polygamous, incestuous, or prohibited by law,"⁶⁰ the New York courts resolving for themselves what marriages are to be so qualified. In the leading case, *Olmsted v. Olmsted*, the Supreme Court of the United States decided that by such an attitude the Full Faith and Credit Clause was

⁵⁶ CHESHIRE 387.

⁵⁷ FOSTER, "Some Defects in the English Rules of Conflict of Laws," 16 Brit. Year Book Int. Law (1935) 84, 89.

⁵⁸ 2 BEALE 706; TAINTOR, 18 Can. Bar Rev. (1940) at 600, *supra* n. 1.

⁵⁹ *Olmsted v. Olmsted* (1908) 190 N. Y. 458, 467, 83 N. E. 569, 571, *aff'd* 216 U. S. 386, see *infra* n. 61 (bigamous subsequent marriage with following divorce from first wife), *In re Thomann's Estate* (1932) 144 N. Y. Misc. 497, 258 N. Y. Supp. 838 (divorce not recognized in New York for lack of personal service, remarriage in Russia).

⁶⁰ See *In re Bruington's Estate* (1936) 160 N. Y. Misc. 34 at 37, 289 N. Y. Supp. 725 at 729 (children of bigamous marriage).

not violated,⁶¹ but it remains uncertain whether the independence of state doctrines would likewise be maintained in cases other than those where inheritance of real estate or a remainder under a will is at issue and only immovables in the state are involved.⁶² However this may be, the peculiar policy of the courts of New York has been severely and convincingly criticized, in particular with respect to a repetition of the doctrine in the *Bruington* case of 1936⁶³ after the legislature of New York had begun to follow the trend of courts and statutes benevolent to children.⁶⁴

(c) *Germany*. The prevailing American rule has its exact counterpart in the German practice.⁶⁵ The national law of the pseudo-husband is applied in determining legitimacy, whether this law acknowledges legitimacy irrespective of the good faith of the parties⁶⁶ or conditionally upon the good faith of one party (putative marriage).⁶⁷ The Reichsgericht has expressly rejected the theory that the law governing the nullity of the marriage should determine also whether or not the children are to be considered legitimate.⁶⁸

(d) *Other countries*. The policy practiced in other countries probably runs along similar lines. French writers, it is true, advocate again the exclusion of children born in adultery, from any recognized legitimacy,⁶⁹ but even this restriction is not certain.⁷⁰

⁶¹ (1910) 216 U. S. 386.

⁶² See TAINTOR, 18 Can. Bar Rev. (1940) at 691, 692, *supra* n. 1.

⁶³ *Supra* n. 60.

⁶⁴ Note, 46 Yale L. J. (1937) 1049, 1054; TAINTOR, 18 Can. Bar Rev. (1940) at 710, *supra* n. 1.

⁶⁵ RG. (Nov. 11, 1937) JW. 1938, 108, KG. (Dec. 9, 1921) 42 ROLG. 97; KG. (Feb. 27, 1931) IPRspr. 1931, no. 83; KG. (July 9, 1937) JW. 1937, 2526, Clunet 1938, 341.

⁶⁶ E.g., Swiss C. C. art. 133.

⁶⁷ E.g., French C. C. arts. 201, 202; Ital. C. C. (1865) art. 116; C. C. (1942) art. 128; German BGB. § 1699.

⁶⁸ RG. (Nov. 11, 1937) JW. 1938, 108 rejecting RAAPE 499.

⁶⁹ See especially LEREBOURS-PIGEONNIÈRE 411 no. 347.

⁷⁰ Compare the practice whereby the spouse in good faith and his or her children of the bigamous marriage enjoy the benefit of putative marriage. See

III. LEGITIMATION BY SUBSEQUENT MARRIAGE

An old institution of civil law but unknown to the British common law and expressly rejected by the Statute of Merton, legitimation by the marriage of the child's natural parents, has been introduced by statute in all but three jurisdictions in this country,⁷¹ in all of the common law provinces of Canada during 1920 to 1928,⁷² and in England by the Legitimacy Act, 1926.⁷³

An important difference exists on the question whether in addition to the marriage some recognition of the child is required. This requirement, in contrast to the German tradition, exists in the Latin systems and in almost half of the American statutes, a fact regretted by Vernier⁷⁴ as inconsistent with the purpose to improve the status of children born out of wedlock. It ensues from this system that a child may be considered legitimate only in relation to one parent. Moreover, the French system takes into account which parent is first to recognize the child.

A. RULES

1. Decisive Time

English courts, starting from the thesis that legitimacy is determined by the law of the child's domicile of origin, viz., his father's domicile at the time of his birth, regarded it essential that this law recognize the possibility of legitimation by a later marriage.⁷⁵ This artificial theory, already rejected

supra pp. 545-550 and particularly Cour Paris (March 30, 1938) *Nouv. Revue* 1938, 353.

⁷¹ 4 VERNIER § 243.

⁷² 1 JOHNSON 344 n. 1; for Ontario see Ontario Legitimation Act, 1921, 11 Geo. V, c. 53, as amended 1927, Rev. Stat. Ontario, c. 187 s. 1, same in Rev. Stat. Ontario 1937, c. 216.

⁷³ 16 & 17 Geo. V, c. 60.

⁷⁴ 4 VERNIER § 243.

⁷⁵ *In re Wright's Trusts* (1856) 2 K. & J. 595, 604; *In re Goodman's Trusts* (1881) 17 Ch. D. 266, *In re Andros* (1883) 24 Ch. D. 637; *In re Grove*,

by Savigny,⁷⁶ has been eradicated in England by the Legitimacy Act of 1926⁷⁷ but has nevertheless been adopted as a common law rule by Beale⁷⁸ and the Restatement.⁷⁹ The ancient basis for this rule, namely, that birth may give the child a certain faculty to be legitimized,⁸⁰ appears in the older English doctrine and also in Beale's theory in the form of a supposed logical necessity that the child must have a "potential legitimacy" by the law of the father's domicil. Probably no American decision of actual importance reflects this preconceived idea.⁸¹ However, under the circumstances, Scott, L. J., in *In re Luck* (1940),⁸² was justified in thinking the theory to be connected with the American law, although eliminated from the English. He stated:

"The very idea of attributing to a newly-born child, to a *filius nullius*, a sort of latent capacity for legitimation at the hands of the natural father to whom he is denied any legal relation, seems to me an even more absurd legal fiction and even less convincing than that mythical contract of marriage supposed by the canonists to have been entered into at the moment of procreation."

In England,⁸³ as well as in the United States,⁸⁴ it has become perfectly certain that, in the case of a subsequent mar-

Vaucher v. Treasury Solicitor (1888) 40 Ch. D. 216. For history and criticism see MANN, "Legitimation and Adoption in Private International Law," 57 Law Q. Rev. (1941) 112, 115-122.

⁷⁶ SAVIGNY 338 § 380, tr. by GUTHRIE 302.

⁷⁷ Legitimacy Act, 1926 § 1 (1) for English and § 8 (1) for foreign domiciliaries.

⁷⁸ 2 BEALE 706-709 §§ 139.1 and 139.2.

⁷⁹ Restatement § 137.

⁸⁰ Cf. SCHAEFFNER, *Entwicklung des Internationalen Privatrechts* (Frankfurt, 1841) 49 § 37, tr. in GUTHRIE's translation of SAVIGNY 308.

⁸¹ See cases in 73 A. L. R. 941, 952ff. and cf. MINOR 216ff.; Notes, 20 Harv. L. Rev. (1907) 400; 46 Yale L. J. (1937) 1051 n. 15; also STUMBERG 305 n. 30, although he surprisingly acknowledges the "logic of the English point of view"; TANTOR, 18 Can. Bar Rev. (1940) at 619, 620, 628, *supra* n. 1.

⁸² *In re Luck's Settlement Trusts* [1940] Ch. D. 864, 912.

⁸³ *In re Askew* [1930] 2 Ch. D. 259.

⁸⁴ *Stack v. Stack* (1887) 6 Dem. Sur. (N. Y.) 280, 15 N. Y. St. Rep. 416; *Dayton v. Adkisson* (1889) 45 N. J. Eq. 603, 17 Atl. 964; *De Wolf v.*

riage, the time when the child was born is of no importance.

Also in other legislations, although some provisions contain obscure elements,⁸⁵ as a rule the applicable law is simply that of the time of legitimation. In some texts, this is emphasized with the express statement that the status of the parent at the time of the conception and of the birth are immaterial.⁸⁶ Such a statement corresponds in the broader field of legitimacy in general with the idea that legitimacy is acquired or denied by the law of the time when it originates, whether by birth or by marriage or by decree or "any other cause," as is the formula of the recent Finnish law.⁸⁷

We may take it that where, under the legislation thus governing, an act of legitimation is void, it cannot be helped by later events. This is also the general proposition of the American cases.⁸⁸ The status created at the time of a subsequent marriage (or any other act of legitimation) is permanent.

Adequate application of this principle to the legislations of the French system (where a formal acknowledgment of paternity or maternity is an essential part of legitimation by subsequent marriage) depends upon the question whether recognition is allowed after the marriage. In the older style of these enactments, the recognition had to take place before or as part of the act of celebrating the marriage,⁸⁹ so that the status was fixed at the moment of the marriage.⁹⁰ Now the

Middleton (1893) 18 R. I. 810, 31 Atl. 271; *cf.* Note, 46 Yale L. J. (1937) 1049, 1051 n. 15.

⁸⁵ Especially art. 315 (new 349) of the Argentine Civil Code is defectively drafted.

⁸⁶ E.g., Argentina: C. C. art. 315 (new 349).

Portugal, Law for the Protection of Children of Dec. 25, 1910, art. 2.

⁸⁷ Finland: Law of 1929, § 22; *cf.* Poland: Law of 1926, § 22.

⁸⁸ *Smith v. Kelly* (1851) 23 Miss. 167 (subsequent marriage during domicil in South Carolina does not legitimate an issue previously born; the later domicil of the family in Mississippi was of no avail). For the general rule see *In re Presley's Estate* (1925) 113 Okla. 160, 164, 240 Pac. 89, 93; TAINTOR, 18 Can. Bar Rev. (1940) at 617, *supra* p. 555, n. 1, and *infra* p. 587, n. 169.

⁸⁹ Code Napoléon art. 331, widely copied.

⁹⁰ WEISS, 4 *Traité* 90.

French and some other municipal laws permit recognition of paternity or maternity after a subsequent marriage,⁹¹ and either postpone the effect of legitimation until the later event⁹² or make it retroactive to the time of marriage.⁹³ It may well be concluded that the decisive moment for the choice of law also is deferred to the time of recognition. The personal law of this later moment decides on the question of retroactivity. Such a view might be suitable also to this country, where in many jurisdictions acknowledgment must be added to a subsequent marriage in order to complete legitimation and is generally permitted after the marriage.⁹⁴

Such a supplement to a previous act of legitimation may likewise be accomplished in the case when the parent has acquired a new personal law. The provisions of this new law determine the decision without regard to any former personal law. Suppose the parents have married after the birth of the child, when they were domiciliaries or nationals of a country whose law does not know legitimation by marriage. If they change their personal status afterward and their new personal law allows legitimation and considers a belated recognition sufficient, such recognition can be effected accordingly.⁹⁵

2. Contacts: Usual Rules

(a) *Law of Domicil.* The law of the domicil of the parents at the time of marriage governs legitimation by subsequent marriage in England and in the United States. It is quite possible that a child, in view of its illegitimacy, has a separate

⁹¹ Spain: C. C. art. 121; France: C. C. art. 331 as amended by Laws of Dec. 30, 1915 and of April 25, 1924.

⁹² Bulgaria: Law of Dec. 17, 1889 as amended by Decree of Oct. 22, 1935, art. 18; Italy: C. C. (1942) art. 283 "or from the day of a recognition posterior to the (subsequent) marriage."

⁹³ Spain: C. C. art. 123. The preliminary draft of the Italian Civil Code (1930) art. 320 followed this rule; cf. *Relazione sul progetto* (1931) 167.

⁹⁴ In the case of *Smith v. Kelly*, *supra* n. 88, at 170, the father would have been able, according to the said view, to add to the ineffective South Carolinian marriage an acknowledgment in Mississippi.

⁹⁵ See RAAPE, 50 *Recueil* 1934 IV 405, 441.

domicil at that time, but this does not count.⁹⁶ Analogous rules obtain in Argentina,⁹⁷ Switzerland (with respect to foreign legitimations by foreigners),⁹⁸ and the other countries following the domiciliary principles.⁹⁹

(b) *Law of Nationality*. The national law of the father at the time of marriage or recognition governs the problem under most European conflicts laws.¹⁰⁰

3. Personal Law of the Child

Under some of the more recent conflicts legislations, however, the personal law of the child is observed in determining the question whether legitimation requires certain conditions

⁹⁶ Restatement § 140, comment b adds, it is true, a *caveat* that the law of the child's domicil might be sufficient to grant legitimation; but the basis for this allegation is not apparent.

⁹⁷ Argentina: C. C. arts. 313-315 (new 347-349), very difficult to understand. ROMERO DEL PRADO, *Der. Int. Priv.* 330, calls these articles manifestly contradictory; VICO does not attempt any comment. Such an attempt was risked by the Berlin KG. (Feb. 5, 1932) IPRspr. 1932, no. 96.

⁹⁸ Switzerland, NAG. art. 28. In the case of a husband of Swiss nationality, the application of Swiss law is provided by the Federal Constitution, art. 54. See BURCKHARDT, *Kommentar der Schweizerischen Bundesverfassung* 513ff.; BECK, NAG. 246 no. 106.

⁹⁹ Denmark: BORUM and MEYER, 6 *Répert.* 221 no. 53.

Norway: CHRISTIANSEN, 6 *Répert.* 576 no. 126.

Uruguay: Ap. Montevideo (April 27, 1910) *Clunet* 1914, 674.

Brazil: Introductory Law (1942) art. 7, apparently covering the problem.

¹⁰⁰ Belgium: App. Bruxelles (June 19, 1907) *Clunet* 1907, 462, POULLET 514 no. 395.

Finland: Law of 1929, § 22.

France: prevailing opinion, see PILLET, 1 *Traité* 644 no. 313. SURVILLE 459 no. 313; NIBOYET 770 no. 651 (2).

Germany: EG. art. 22 par. 1.

Greece: C. C. (1940) art. 22.

Guatemala: see MATOS no. 274 (except where the child is not under parental power) but, under the actual laws, it would be more consistent to apply the domiciliary test.

Italy: C. C. (1942) *Disp. Prel.* art. 20 par. 1.

Japan: Law of 1898, art. 18.

Poland: Law of 1926, art. 22.

Switzerland: NAG. art. 8; where the marriage is celebrated in Switzerland, see BG. (May 31, 1919) 45 BGE. I 155, 163; BG. (Jan. 28 and May 20, 1914) 40 BGE. II 295, 302. BECK, NAG. 171 no. 64. If the father is a German or an Italian, authorization by the court is needed, Just. Dept., *Bundesblatt* 1941, 1103 no. 8, 1104 no. 9.

to be fulfilled in the person of the child, such as consent by the child or its guardian.¹⁰¹

Occasionally the national law of the child has been claimed to govern legitimation as a whole.¹⁰² This opinion has been generally rejected, however.¹⁰³ The contrary view prevails for the good reasons that legitimation is an effect of marriage, that one law should govern the family as a unit, and that the child's entrance into this family should not be prescribed by another legislation. The English Act of 1926 refers distinctly to the law of the father's domicile, because otherwise a domiciled Englishman could be burdened with a child legitimized abroad.¹⁰⁴ It is equally certain in the United States that neither the law of the domicile of the child nor that of the mother controls any acts of legitimation by the father.¹⁰⁵ Moreover, if the child's own law is adverse to the legitimizing effect of marriage, the child should not suffer therefor.¹⁰⁶

In a third opinion, the law of both parent and child must concur for every requisite in allowing legitimation.¹⁰⁷ As usual,

¹⁰¹ GEBHARD, Draft I (1881) § 22, Gebhardsche Materialien 7.

China: Law of 1918, art. 13.

Japan: Law of 1898, art. 18.

Código Bustamante art. 60, but see *infra* n. 109. Cf. BAR § 102, n. 4. However, what conditions of such kind are provided for in actual legislations? RAAPE 559 deals with the requisite of consent by a child of full age.

¹⁰² In France a few decisions about 1926-1927 were to this effect; also BARTIN in 9 AUBRY et RAU § 546, 81, n.8 *ter*, see also for the Netherlands, MULDER 120-122.

¹⁰³ For France, see BATIFFOL, *Revue Crit.* 1935, 623 no. 14; J. DONNEDIEU DE VABRES 497.

¹⁰⁴ See Note, 7 *Cambr. L. J.* (1941) 405.

¹⁰⁵ *Blythe v. Ayres* (1892) 96 Cal. 532, 572, 31 Pac. 915; *In re Presley's Estate* (1925) 113 Okla. 160, 240 Pac. 89.

¹⁰⁶ PILLET, 1 *Traité* 647 no. 315; POULLET 514 no. 395; *Novelles Belges*, 2 D. Civ. 620 no. 591; RAAPE 551 (b), 558 (b); *Trib. civ. Seine* (Dec. 21, 1916) *Clunet* 1917, 1419; *Cass. (civ.)* (Nov. 23, 1857) D.1857.1.423, S.1858.1.294.

¹⁰⁷ France: Isolated decisions.

Italy: DIENA, 2 *Princ.* 183.

The Netherlands: KOSTERS 550; VAN HASSELT, 6 *Répert.* 635 no. 200. Código Bustamante art. 60 *in fine*.

Brazil (under the former law): BEVILAQUA, 1 *Código Civil* (ed. 6, 1940) *Introd. art.* 8 no. 18.

such a doctrinary cumulation of laws is a very inconvenient solution.

4. Rules on Effects of Legitimation

Most of the rules mentioned determine both the act of legitimation and the effect of this act. In some codifications, however, special rules have been provided with respect to the effects of legitimation.¹⁰⁸ The *Código Bustamante*, in particular, states that:

"The effects of legitimation and the action for contesting a legitimation are governed by the personal law of the child."¹⁰⁹

It seems that this rule is destined in the first place to take care of the case where the legitimated person has retained his separate nationality and under his national law becomes of full age earlier than under that of the parent,¹¹⁰ but the fact that by such an event parental power is terminated rests upon the nationality law and upon the law of status and is not an incident of the parent-child relation.

5. Renvoi

As is their wont, French and German courts apply renvoi,¹¹¹ and English courts follow in applying any law that is applied at the domicil of the parent. It was in fact a case of

¹⁰⁸ Japan: Law of 1898, art. 18 par. 2.

China: Law of 1918, art. 13 par. 2.

¹⁰⁹ Art. 62.

¹¹⁰ See BUSTAMANTE, 2 Der. Int. Priv. 74.

¹¹¹ France: Cour Paris (March 23, 1888) S.1888.2.131, Clunet 1889, 638 (Irishman); Trib. civ. Seine (Dec. 21, 1916) Clunet 1917, 1419 (Englishman from Mauritius).

Germany. KG. (Nov. 21, 1930) IPRspr. 1931, no. 88; and in the same case, KG. (Feb. 5, 1932) IPRspr. 1932, no. 96 (marriage of an Argentinian domiciled in Florida, law of Florida applied); LG. Wiesbaden (Oct. 10, 1932) JW. 1933, 193 (Englishman if domiciled in the Netherlands, Dutch law applied).

Italy: a decision of App. Firenze (Jan. 23, 1919) 12 Rivista (1918) 288, against the current Italian doctrine.

legitimation that gave rise to the celebrated judgment upon renvoi of Lord Maugham in *In re Askew*.¹¹²

6. Soviet Russia

The problem offered by the Soviet Russian law and those American statutes which make no distinction between legitimacy and illegitimacy has been more discussed in connection with the subject of legitimation than with that of legitimate birth. A German court has held that the child of a Russian who married the German mother after the birth was illegitimate, because the Russian law does not know legitimation.¹¹³ However, as the Russian law does not discriminate and as under German law the child who was, before the marriage, an illegitimate relative of the mother, would become by the marriage a fully recognized child of both parents, legitimacy agrees with the spirit of both legislations involved.¹¹⁴ An analogous view is certainly appropriate in this country where the parents of a previously born child marry in Arizona or North Dakota.¹¹⁵

B. SCOPE

1. Validity of the Marriage

Conforming to principles mentioned before, the validity of the marriage is to be determined under the ordinary rules concerning the formalities, on one hand, and the intrinsic validity of marriage, on the other.

Illustration: The parents, Frenchmen, having lived in concubinage in France, went to New York and continued there to live together. French courts made the recognition of the mar-

¹¹² *In re Askew* [1930] 2 Ch. 259, Clunet 1931, 175, followed in *Collins v. Att. Gen.* (1931) 47 T. L. R. 484, 145 L. T. 551. Cf. 6 Zausl.P.R. (1932) 620.

¹¹³ StAZ. 1930, 44, cited with apparent approval by NUSSBAUM, IPR. 172 n. 6.

¹¹⁴ This solution was foreseen by RAAPE 568, 569; and RAAPE, 50 Recueil 1934 IV at 505.

¹¹⁵ See *supra* n. 38.

riage dependent upon the question whether their relation had assumed at some time the character of a common law marriage under New York law, and this is pertinent also to legitimation.¹¹⁶

2. Conditions and Effects of Legitimation

Where the marriage is valid under all laws concerned, the conflicts rule is applicable to the questions:

(i) Whether legitimation follows from the marriage always, or never, or not for the issue from adulterous or incestuous cohabitations,¹¹⁷ or only for certain privileged classes of children, for instance the issue of a couple engaged to marry;¹¹⁸

Whether legitimation is invalid where it is proved that the child has not actually been begotten by the husband or borne by the wife of the marriage;

Whether consent of the child is required,¹¹⁹ *et cetera*.

(ii) Regarding the acts sometimes required in addition to the marriage ceremony, particularly the formal acknowledgment of paternity or maternity as required by the French Civil Code, art. 331, and its many followers.¹²⁰ This provision has been applied by the French courts as an incident of the personal law to Frenchmen at the forum and abroad.¹²¹ Likewise, where the man is of Bulgarian nationality, a court in Germany (where no such requisites exist) requires recognition by both parents according to the Bulgarian provision.¹²²

¹¹⁶ See the case of Trib. civ. Havre (Feb. 14, 1907) and App. Rouen (Feb. 26, 1908) Clunet 1909, 1057; the question was left open only because the recognition of maternity was missing in any case.

¹¹⁷ France, England, Italy, the Netherlands, etc.

¹¹⁸ E.g., Sweden: Law of June 14, 1917 on Illegitimate Children, *cf.* Law of June 27, 1924.

¹¹⁹ Chile: C. C. art. 210 (adult child); art. 211 (child with tutor or curator).

¹²⁰ La. Rev. Civ. Code Ann. (1932) art. 198. Belgium: C. C. art. 331, *cf.* 342(b). The Netherlands, Rumania, Sweden, Brazil.

¹²¹ Cass. (req.) (Jan. 20, 1879) S.1879.1.417; Cass. (civ.) (April 20, 1885) D.1886.1.23; Cass. (req.) (July 8, 1886) Clunet 1886, 585.

¹²² KG. (Nov. 29, 1929) HRR. 1930, no. 882, IPRspr. 1930, no. 85 (on the ground that the Bulgarian provision requiring recognition is not meant for evidence of the procreation only).

Conversely, where foreigners marry in the Netherlands, the Dutch requisite of recognition is released in favor of the national law not requiring recognition.¹²³

Since in the new text of the French Civil Code, art. 231, postnuptial recognition is allowed but must be effectuated by court proceedings, this requirement, too, is to be considered a part of the substantive personal law¹²⁴ rather than a formality with territorial effect.¹²⁵

(iii) Respecting the effect attached to legitimation:

Whether legitimation is effective from the time of marriage or retroactively from the birth or from the date of recognition (Anglo-Canadian laws, for instance, prefer the effect from birth);¹²⁶

Whether already existing children born in wedlock retain rights of "primogeniture";¹²⁷

Whether rights normally included in legitimacy are denied;¹²⁸

Whether in particular the child receives the name of the father.¹²⁹

3. Invalid Subsequent Marriage

A delicate question arises, if the subsequent marriage is considered invalid at the forum; under what law should we determine whether, nevertheless, the child is legitimized? Express municipal provisions are made in the German and Swiss Civil Codes,¹³⁰ whereby the rules of putative marriage

¹²³ VAN HASSELT, 6 Répert. 635 no. 201.

¹²⁴ BATIFFOL, 8 Répert. 424 no. 124; a strange case of application: Trib. civ. Rochelle (May 29, 1934) Clunet 1935, 370.

¹²⁵ SURVILLE, Clunet 1916, 769, 780.

¹²⁶ See Ontario Legitimation Act, 1921, 11 Geo. V, c. 53, as amended 1927, Rev. Stat. Ontario, c. 187 s. 1, also in Rev. Stat. Ontario 1937, c. 216 and 1 JOHNSON 344 n. 1. The time of the marriage is maintained as date of effectiveness of the legitimation in Quebec, C. C. art. 239.

¹²⁷ Cf. Austrian Allg. BGB, § 161.

¹²⁸ Germany: cf. Bay. ObLG. (June 8, 1921) 42 ROLG. 105 (Czechoslovakian decree of legitimation withholding rights of inheritance).

¹²⁹ See E. H. PERROUD, Clunet 1911, 503; 4 FRANKENSTEIN 161 n. 40.

¹³⁰ BGB. § 1721; Switzerland: EGGER, 2 Kommentar zum Schweizerischen

should be applied by analogy. Such an analogy is convenient also in the field of the law of conflicts. In the same way that the personal law of the parent at the time of the marriage determines whether legitimacy is dependent or not upon a valid marriage, the law governing legitimation by subsequent marriage should determine also the effect of an invalid subsequent marriage.¹³¹

In the United States it has been contended, however, that where the marriage was void no effect could be recognized with respect to the children.¹³² As a matter of fact, the statutes conferring legitimacy on children, irrespective of the intrinsic validity of the marriage, have overlooked the case of a subsequent marriage, but it may be asked whether courts should not grant analogous application¹³³ by virtue of the liberal construction generally given these beneficial statutes. Were this done by the domiciliary law, no other jurisdiction would have any reason to refuse recognition.

The inverse case that the marriage is considered invalid under the personal law but valid under the internal rules, has been discussed in Germany; the father's personal law was said to determine the parent-child relationship in this case also.¹³⁴

4. Acquisition of Nationality

Nationality of the parent is regularly transferred by legitimation to the child in the Continental European laws. This

Zivilgesetzbuch art. 258 (1) (b). In France, the construction of C. C. arts. 201 and 202 is in controversy; see PLANIOL, 1 *Traité élémentaire de droit civil* (ed. 8, 1920-1921) 362 no. 1109.

¹³¹ In this sense also 4 FRANKENSTEIN 153 (d), while RAAPE 570 follows his theory referred to, *supra* p. 570, n. 68.

¹³² 2 BEALE 708 n. 5. The decision in the *Matter of Look Wong* (1915) 4 U. S. Dist. Haw. 568, cited by BEALE, does not seem to support this view, but it has been expressed in *Adams v. Adams* (1891) 154 Mass. 290, 28 N. E. 260 even with respect to the liberal California legislation.

¹³³ Cf. Note, 46 Yale L. J. (1937) 1049, 1051 n. 16.

¹³⁴ RAAPE, JW. 1934, 2951; same in 50 *Recueil* 1934 IV 405, 487 no. 63 against other opinions.

raises peculiar problems, particularly in France.¹³⁵ English law excludes this acquisition of nationality.¹³⁶

5. Prohibitive Public Policy of the Forum

Much thought has been given to those municipal provisions which prevent legitimation of the children conceived or born in polygamous, incestuous, or bigamous relations. There is no such provision in most American jurisdictions nor in Germany, the Scandinavian countries, nor Switzerland. The Venezuelan Civil Code expressly permits legitimation by subsequent marriage even though the parents were incapable of marrying at the time of the conception.¹³⁷ The former text was similar, but it prohibited the recognition of children born to such marriages.¹³⁸ Yet British and French influence has prompted a great number of provisions against such a legitimation. Recent French reforms modifying the famous article 335 of the *Code Napoléon* brought only partial relief.¹³⁹

(a) *United States*. The courts of New York persist in their general policy of outlawing the children of "prohibited" marriages.¹⁴⁰ In the other states, the weight of authority recognizes the domiciliary law without objection stemming from an opposed local policy.¹⁴¹

¹³⁵ Law on Nationality of August 10, 1927, art. 1 (4); ANCEL "La nationalité de l'enfant légitimé," *Clunet* 1933, 5.

¹³⁶ *Abraham v. Att. Gen.* [1934] P. 17.

¹³⁷ Venezuela, C. C. (1942) art. 227 par. 2.

¹³⁸ Venezuela, C. C. (1922) art. 248 par. 2, cf. art. 233.

¹³⁹ Amended by Law of Dec. 30, 1915; cf. Ital. C. C. (1942) arts. 251, 281.

¹⁴⁰ See *Olmsted v. Olmsted* (1908) 190 N. Y. 458, 83 N. E. 569, aff'd 216 U. S. 386 and *In re Bruington's Estate* (1936) 160 N. Y. Misc. 34, 289 N. Y. Supp. 725, cited *supra* notes 59 and 60 respectively.

¹⁴¹ *Mund v. Rehaume* (1911) 51 Colo. 129, 117 Pac. 159 (near relationship); *Moore v. Saxton* (1916) 90 Conn. 164, 96 Atl. 960 (bigamy); *Succession of Caballero* (1872) 24 La. Ann. 572 (miscegenation); *Green v. Kelley* (1917) 228 Mass. 602, 118 N. E. 235 (bigamy); *Ng. Suey Hi v. Weedon*, Commissioner of Immigration (1927) 21 F. (2d) 801 (polygamy); see also *Holloway v. Safe Deposit & Trust Co. of Baltimore* (1926) 151 Md. 321, 134 Atl. 497 at 499. The case of *Matter of Look Wong* (1915) 4 U. S. Dist. Haw. 568, where recognition of children of a Chinese marriage was withheld, has been called unfortunate and unsound, Note, 31 Harv. L. Rev. (1917) 892. See also *McNamara, v. McNamara* (1922) 303 Ill. 191, 135 N. E. 410 (legitimation by conduct).

(b) *England*. According to the British Legitimacy Act of 1926, the offspring of an adulterous union cannot be legitimated when the parents are domiciled in England, but no such express clause has been added in section 8 (1) dealing with marriages celebrated while the spouses are domiciled abroad. By reasonable interpretation, it has been held that a child born of a father with a foreign domicil is legitimated according to the domiciliary law without interference by English public policy.¹⁴²

(c) *Continent*. Similarly, legitimation is recognized in France when foreign nationals marry abroad,¹⁴³ except in the case where the parents, both formerly French, have abandoned their nationality for the purpose of evading the French provision against legitimation of adulterines.¹⁴⁴ However, the problem has been much discussed,¹⁴⁵ and an increasingly nationalistic attitude of the Court of Cassation has made from what is left of article 335 of the Civil Code, after repeated modifications, a rule of "*ordre public international*."¹⁴⁶ This possibly means that adulterine children

¹⁴² *In re Collins v. Att. Gen.* (1931) 47 T.L.R. 486, 145 L.T. 551. CHESHIRE 391 n. 2, raising a formalistic doubt, is too much impressed by the opinion of a Chancery official.

¹⁴³ Cour Paris (Aug. 2, 1866) S.1866.2.342; Cour Paris (July 2, 1926) Clunet 1927, 77. Belgium: App. Bruxelles (June 19, 1907) Clunet 1907, 1154.

¹⁴⁴ Cour Paris (July 16, 1902) Clunet 1903, 392 (French parties had become Swiss citizens).

¹⁴⁵ On the different opinions and the stages of development of the cases see WEISS, 4 *Traité* 94; VALÉRY 1147 no. I. 808; NIBOYET 771 no. 652; LEREBOURS-PIGEONNIÈRE 318 no. 279, *ibid.* 411 no. 347; BARTIN, 2 *Principes* 359 § 324 (critical); Notes to Cass. (civ.) (March 31, 1930) by SAVATIER, D.1930.1.113 and BATIFFOL, 8 *Répert.* 425 nos. 134ff. and *Revue Crit.* 1934, 615.

¹⁴⁶ Cass. (civ.) (March 31, 1930) D.1930.1.113 at 118, S.1931.1.9 and *ibid.* at 177, Case Note by GÉNY; Clunet 1930, 650, *Revue Crit.* 1934, 615 (a Russian, Reweliotty, married and being father of children by this marriage, had an illegitimate child in France by one Struve, whom he married after having been divorced from his first wife. Both parents had acknowledged the child. The Czarist law admitted legitimacy, and the Soviet Russian law ignores any qualifications of children. The Appeal Court refused recognition for the double reason that the child, being of French nationality, was subject to French law. LEREBOURS-PIGEONNIÈRE 412 n. 1, and 415 n. 1 stresses the point that the Supreme Court did not disapprove of the second ground, although it did not examine it. Similar in Belgium: Trib. civ. Bruxelles (March 27, 1930) *Pasicrisie* 1930.3.173 and Trib. civ. Liège (Nov. 13, 1930), both in *Revue* 1933, 358, even for the case

cannot be legitimated where any one of the three persons involved is of French nationality or a part of the facts happened in France. The courts are apprehensive that the people may become accustomed to polygamy!

Where all three persons are of foreign nationality, however, the objection of public policy is unlikely to be raised in a European court.¹⁴⁷ But *renvoi* may have an influence on these considerations. For instance, where an Englishman was domiciled and married in the Netherlands, a German court, by *renvoi* from the national English law, applied Dutch law in determining that the premarital issue was not legitimized because born in adultery.¹⁴⁸

Also on the grounds of public policy, the Appeal Court of Hamburg¹⁴⁹ refused to recognize a legitimation valid under Dutch law, where an unmarried woman of German nationality, mother of a German child, married a Dutchman and both parties recognized the child as their own. The German courts, like those of some American jurisdictions,¹⁵⁰ regard as necessary for legitimation that the man marrying the mother shall in fact be the father. The Court extended this requirement to the foreign legitimation of a German child, on the ground that, if the child is not actually an offspring of the married couple, its interest ought to be protected as is done through the other form of legitimation, viz., in the course of legitimation by state authority. This reasoning results, however, in creating a double status of the child as legitimate abroad and

where recognition was made abroad, on the worn authority of 5 LAURENT 554 no. 266.

¹⁴⁷ Cf. KOSTERS 538, 554.

¹⁴⁸ LG. Wiesbaden (Oct. 10, 1932) JW. 1933, 193, IPRspr. 1933, no. 51.

¹⁴⁹ OLG. Hamburg (Aug. 16, 1935) Hans. RGZ. 1935, B 495 no. 135.

¹⁵⁰ Pike v. Standage (1919) 187 Iowa 1152, 175 N. W. 12; Helm v. Goin (1929) 227 Ky. 773 at 778, 14 S. W. (2d) 183; Eichorn v. Zedaker (1924) 109 Ohio St. 609, 144 N. E. 258; Harper v. Harper (1932) 159 Va. 210, 165 S. E. 490; Mooney v. Mooney (1912) 244 Mo. 372, 148 S. W. 896.

illegitimate at the forum,¹⁵¹ and should not be followed in the jurisdictions mentioned above.

6. Permissive Public Policy of the Forum

Occasionally, the father's law prohibiting legitimation has been disregarded for reasons of a benevolent local policy.¹⁵² French courts affirmed the effect of legitimation under French law where an Englishman married a French woman, although legitimation was not yet recognized by English law.¹⁵³ This may be the right decision, provided the couple is domiciled in France.¹⁵⁴

7. Law of Situs

The famous English case of *Birtwhistle v. Vardill*¹⁵⁵ has retained authority, inasmuch as a state where land is situated may require birth in lawful wedlock for the capacity of inheriting land, although in other respects foreign legitimation by subsequent marriage is recognized, and certainly in England it has been recognized in all respects by the law of 1926.¹⁵⁶ Very few American cases have followed this doctrine,¹⁵⁷ more suitable, indeed, to old feudal institutions.

¹⁵¹ Cf. ECKSTEIN and LORENZ, notes to the decision in 6 Giur. Comp. DIP. no. 132.

¹⁵² RAAPE 562 (a), 563 in the case of a Belgian domiciled in Germany who in adultery had a child by a German woman, later married the mother of the child in Germany.

¹⁵³ Cass. (civ.) (Nov. 23, 1857) S.1858.1.293 (sounding as though French law were always applicable); Cour Bourges (May 26, 1858) S.1858.2.532, D.1858.2.178; App. Rouen (Jan. 5, 1887) Clunet 1887, 183; Cour Paris (March 23, 1888) Clunet 1889, 638, approved by VALÉRY 1148 no. II. 802; but disapproved by most writers, see WEISS, 4 Traité 96ff.; DESPAGNET 838 no. 277; SURVILLE 461 no. 313.

¹⁵⁴ NIBOYET 734 no. 625 II.

¹⁵⁵ (1826) 5 Barn. & C. 438; (1835) 2 Cl. & F. 571; (1840) 7 Cl. & F. 895.

¹⁵⁶ See FALCONBRIDGE, "Conflict of Laws: Characterization," 15 Can. Bar Rev. (1937) 215 at 242 (giving information on the Canadian legislation).

¹⁵⁷ Alabama: *Lingen v. Lingen* (1871) 45 Ala. 410 (no recognition of any status created by foreign legitimation); Florida: Statutes (1941) § 731.23 (7); Williams v. Kimball (1895) 35 Fla. 49, 16 So. 783; Pennsylvania: 48 Pa.

IV. LEGITIMATION BY OTHER ACTS

"*Legitimatio per rescriptum principis*," by which the emperor in the Roman imperial epoch elevated a child to the status of legitimacy, has been preserved in numerous civil law countries. The state's chief acted on the instance of the father, or of both parents, or upon the father's wish expressed in a will.¹⁵⁸ In some countries, the legislature¹⁵⁹ or the monarch or state president was replaced by courts.¹⁶⁰ This method has been followed in a few common law jurisdictions of the United States.¹⁶¹

Moreover, legitimation may be effected by parental acknowledgment or by conduct of public repute, so as to place the child upon the footing of a legitimate child. Thus, in eight states of the Union by oral or written, and in Michigan, by written acknowledgment,¹⁶² legitimation is performed for all intents and purposes.¹⁶³ We are not dealing now with institutions conferring limited rights upon an illegitimate child. The subject includes, however, those kinds of legitimation which give the child a full position of legitimacy minus the right of inheritance, as in Delaware and Czechoslovakia.¹⁶⁴

Stat. Ann. (Purdon, 1930) § 167 (Act of May 14, 1857, P. L. 507, § 1); Smith v. Derr's Adm'rs (1859) 34 Pa. 126. *Contra*: see Note, 46 Yale L. J. (1937) 1049 and *cf.* on the cases TAINTOR, 18 Can. Bar Rev. (1940) at 715, *supra* n. 1.

¹⁵⁸ E.g., Austria: Allg. BGB. § 162.

Germany: BGB. § 1723.

Italy: C. C. (1865) art. 198ff., C. C. (1942) art. 284ff.

The Netherlands: BW arts. 329, 330.

Spain: C. C. art. 120.

¹⁵⁹ See, e.g., the Arkansas special statute of Oct. 27, 1835, referred to in Scott v. Key (1856) 11 La. Ann. 232.

¹⁶⁰ Peru: C. C. (1936) arts. 314, 319; Venezuela: C. C. (1916) art. 251, C. C. (1942) art. 230. See also Switzerland: C. C. art. 260.

¹⁶¹ Georgia, Mississippi, North Carolina, Tennessee; 4 VERNIER 181 § 245.

¹⁶² 4 VERNIER § 244.

¹⁶³ 4 VERNIER 183 § 246.

¹⁶⁴ 4 VERNIER § 245. Allg. BGB. § 162. In fact, faced with a Czechoslovakian decree of legitimation, the Bay. ObLG. (June 8, 1921) 42 ROLG. 105 held that the status was concerned and the act should be recorded at the civil status register.

1. United States

The conflicts rule of the United States, in the evidently prevailing opinion,¹⁶⁵ is the same as that concerning subsequent marriage; the law of the domicile at the time of the act governs. It does not matter whether the foreign legitimation has been executed in a form not known at the forum, as for instance by a special statute, nor whether the child would have been barred from legitimation by the policy of the forum. These principles have been very clearly expressed.¹⁶⁶ Also, the child's domicile is not taken into consideration; a legitimation by acknowledgment has been upheld in California despite the English domicile of the child,¹⁶⁷ quite as, conversely, the Virginia statute of 1866, legitimating colored children, was refused application in Massachusetts in respect to a father who was domiciled there, although the child resided in Virginia.¹⁶⁸ A domicile of the father or even of all parties at a time posterior to the legitimating act is without importance.¹⁶⁹

2. England

No case had occurred in England before the Legitimacy Act of 1926, where a foreign legitimation other than by subsequent marriage was in question,¹⁷⁰ and the Act likewise limited itself to recognizing English and foreign legitimations by marriage. Soon afterwards, however, in the case of *In re*

¹⁶⁵ Restatement § 140; STUMBERG 303, 304. The author of the Note in 46 Yale L. J. (1937) 1046, 1053 thinks that the doctrine is in a "chaotic condition," but this contention is not well supported by the few deviating cases and the absence of authority as to certain details.

¹⁶⁶ See e.g., Adkins, J. in *Holloway v. Safe Deposit & Trust Co. of Baltimore* (1926) 151 Md. 321, 134 Atl. 497; Buchanan, J. in *Scott v. Key* (1856) 11 La. Ann. 232 (legitimation by special statute of Arkansas legislature) quotes with STORY § 51 from BOULLENOIS: "*Habilis vel inhabilis in loco domicilii est habilis vel inhabilis in omni loco.*"

¹⁶⁷ *Blythe v. Ayres* (1892) 96 Cal. 532, 31 Pac. 915.

¹⁶⁸ *Irving v. Ford* (1903) 183 Mass. 448, 67 N. E. 366.

¹⁶⁹ *Eddie v. Eddie* (1899) 8 N. D. 376, 79 N. W. 856; *In re Presley's Estate*, *Anderson v. Presley* (1924) 113 Okla. 160, 240 Pac. 89, *supra* p. 573, n. 88.

¹⁷⁰ *Supra* p. 571.

Luck, it happened that an Englishman, when domiciled in England, procreated an illegitimate son and, while domiciled in California, acknowledged him pursuant to the California Civil Code, section 230, by receiving the child into his family with the consent of his wife and by obtaining a decree of legitimation from the time of birth. It would have been a reasonable expectation that the legitimation should simply be recognized under the law of the father's domicile at the time of the act, by analogy to the rule laid down in the law of 1926. The father's domicile at the time of the birth should be of no significance. However, the Chancery judge reached this result by resorting to the child's law,¹⁷¹ which was an unwarranted breach with the principles in force. Two of the three Lords of Appeal were apparently so strongly under the spell of the dogma abolished by the Legitimacy Act, that they refused recognition because of the father's English law as of the time of the birth of the child.¹⁷² The resulting decision is obviously regrettable.¹⁷³

3. National Law of Parent

In the countries following the nationality principle, the rules are the same as in the case of a subsequent marriage. Hence, a foreign legitimation agreeing with the national law of all parties is recognized, even though the specific procedure is unknown to the forum. For example, French courts respect a foreign legitimation by state authority although unknown to French municipal law.¹⁷⁴

Where the parties are of different nationality, usually the father's law alone is applied.¹⁷⁵

¹⁷¹ *In re Luck's Settlement Trusts* [1940] Ch. D. 323 at 329.

¹⁷² *In re Luck's Settlement Trusts* [1940] Ch. D. 864 at 890.

¹⁷³ See TAINTOR, 18 Can. Bar Rev. (1940) at 621-627, *supra* n. 1; MANN, "Legitimation and Adoption in Private International Law," 57 Law Q. Rev. (1941) 112, 118-122; FALCONBRIDGE, Comment in 19 Can. Bar Rev. (1941) 37, 42, also criticizes the dissenting vote of Scott, L. J.

¹⁷⁴ See Cour Paris (April 13, 1893) Clunet 1893, 557; WEISS, 4 Traité 101; VALÉRY 1150; POULLET 514 no. 395.

¹⁷⁵ See for instance App. Bern (May 11, 1939) 36 SJZ. (1940-1941) 128 no. 23. Swiss C. C. arts. 260ff. applied although the woman and the child were

But with respect to legitimation by acts other than marriage, it is convenient to require the consent of the child or of some competent agent on its behalf, as municipal legislations frequently provide,¹⁷⁶ and there is a tendency to apply such provisions of the child's law as an exception to the rule referring to the father's law. The German statute (EG. art. 22, par. 2) directly provides that in the case of a German child the consent of the child or of the persons and courts charged with the care of it should be secured in accordance with the German rules.¹⁷⁷ French courts and certain writers require application of French law every time that any party is of French nationality.¹⁷⁸

4. Argentine Doctrine

Another application of local public policy, enunciated in Argentina, is that a legitimation by act of a foreign state should not be recognized because "it presents a privilege."¹⁷⁹

V. RECOGNITION OF FOREIGN LEGITIMATION

Much discussion has been devoted to the relations existing between the above-mentioned rules and the conflicts rules concerning succession upon death.

1. Validity of Legitimation as a Preliminary Question

There is a general problem respecting the law applicable to legitimation or adoption, when either one is a condition for

Germans. For an opposite view requiring that the parties and the authority rendering the decree belong to the same state, see WEISS, 4 *Traité* 104; *contra*: ROLIN, 2 *Principes* 158 no. 628.

¹⁷⁶ Cf., for instance, German BGB. § 1726 in contrast to § 1719 (legitimation by subsequent marriage); Peru: C. C. (1936) art. 320; Venezuela: C. C. (1942) art. 233.

¹⁷⁷ It is controversial whether this rule is applicable to foreign children. The prevailing answer is in the negative. See RG. (July 11, 1929) 125 RGZ. 266; RAAPE 549; NUSSBAUM, IPR. 173, n. 3.

¹⁷⁸ See the criticism by CHAMPCOMMUNAL, *Revue* 1910, 57, 73.

¹⁷⁹ 2 VICO no. 171 at 127.

an individual's sharing in a succession upon death.¹⁸⁰ Where a claim to participate in a distribution of assets, governed by the inheritance law of state X, is based on a legitimation created in state Y, should the validity of the legitimation be adjudicated under the law of X or Y? This question occurs in its purest form in third states; should a court in state Z apply its ordinary conflicts rule concerning legitimation or does application by such court of the inheritance law of X by implication include the conflicts rule of X regarding legitimation? (There is, of course, nothing to recommend the *lex fori* of Z, or the substantive legitimation law of X as such.) The problem is significant only where the conflict rules on inheritance and those on legitimation or adoption result in contrasting solutions. No case in the English or American practice to illustrate this contrast has been found by Robertson,¹⁸¹ and only one German decision of the kind has been found. In this case, an Alsatian in adultery had a child by a woman whom he afterwards married. He acquired French nationality by the Treaty of Versailles but died in Germany. As well known, Frenchmen cannot legitimize adulterine children, but Germans are allowed to do so. As the man's succession under the German conflicts rule was governed by French law, the court decided to apply French rules of conflicts. Under the French conflicts rule concerning legitimation, as the court understood it, the legitimation operated in favor of the child in spite of its adulterine position, because the parties were German at the time of their subsequent marriage. Acknowledging the legitimacy of the child, the court therefore ordered that it share in the succession.¹⁸²

The case is instructive in two respects and helps us to distinguish two problems.

¹⁸⁰ The logical necessity of applying the law of the state of inheritance to the preliminary question has been expounded by MELCHIOR § 175; WENGLER, 8 Z.ausl.PR. (1934) 148 at 166; also ROBERTSON, Characterization 137ff.

¹⁸¹ ROBERTSON, *ibid.* 135, 151.

¹⁸² OLG. Karlsruhe (March 20, 1931) IPRspr. 1931, no. 96, Revue 1932, 702.

One of these problems, neglected in Europe, holds an interest in this country, in view of the persistent effort to separate statutes of legitimacy (or status) from statutes of distribution. In the French law, the statute of distribution furnishes only the words: "*enfants et descendants*" (C.C. art. 731). Legitimacy, of course, is presupposed, but an adulterine child is only indirectly excluded by reason of its incapacity to be legitimized. And only the conflicts rule on legitimation prescribes that the ban on adulterine children ceases where all facts happened abroad and at the time did not concern a French national. This seems, in fact, to be the averred doctrine; ¹⁸³ at least the German court was entitled to assume its correctness.

We may conclude that, if recognized at all, the foreign act is valid in our jurisdiction as measured by its own law. It cannot be recognized for the purpose of family law and eliminated for the purpose of distribution.

What the European literature discusses, however, concerns the other problem, namely, whether the German court should have decided the validity of the legitimation according to its own German conflicts rule on legitimation,¹⁸⁴ instead of following the provisions of French law because it governs the succession.¹⁸⁵ The individual case gives no solid basis for arguing this question, since the legitimation could not be denied validity in any event; it had been effectuated in Germany by parties then of German nationality. Arguments of practical convenience may be considered. If such preliminary questions are subjected to the statutes regulating inheritance, consistent application of these statutes may be facilitated. On the other hand, by applying constantly the law indicated by the forum's special conflicts rules on legitimation or adoption, consistency in deciding the effects of the same marriage or adoption is promoted. The latter consideration appears preferable.

¹⁸³ SAVATIER, D.1930.I.116, LEREBOURS-PIGEONNIÈRE 318 no. 279.

¹⁸⁴ RAAPE, 50 Recueil 1934 IV 494.

¹⁸⁵ LEWALD, 4 Rechtsvergl. Handwörterb. 454.

2. Effect of Foreign Legitimation on Inheritance Rights

Where a child has been legitimized under the law of state X and an inheritance is governed by the laws of state Y, should the effect of the legitimation on the inheritance be determined under the inheritance law of X or Y? This much discussed question has no serious significance, if we understand legitimation to mean an act elevating the illegitimate child to full legitimacy. The analogous question concerning foreign adoption is less simple, because an adoption may produce various degrees of rights. It is obvious that full recognition of a foreign legitimation assimilates the child to legitimates in the sense of any statute of distribution which does not except legitimized children, an exception practically occurring only in anachronistic applications of the Statute of Merton.¹⁸⁶

VI. RELATIONS BETWEEN LEGITIMATE PARENTS AND CHILD

A. RULES

A comparative survey of this topic has to face a situation similar to that encountered with respect to the effects of marriage. The Continental systems start from a comprehensive notion of parental power, historically derived partly from the Roman *patria potestas*, partly from the Germanic *munt*, and result in the recognition of a status governed by the personal law of the parent. In common law, much is left to the rules concerning contract, tort, and support; the remaining small domain of domiciliary law is difficult to define.

Even so, we may be astonished at the scarcity of conflicts rules that are discussed in this country with respect to parental rights and duties. The Restatement (§§ 144-148) devotes to parental power as a status only one conflicts rule, subjecting "custodianship" of a legitimate child to the law of the father's domicile at the time of birth, and treats jurisdiction for modify-

¹⁸⁶ See cases cited *supra* p. 585, n. 157.

ing custody in a few sections. Support and domicile are dealt with separately, but neither personal property of a child nor the authority of a parent to act for the child are expressly mentioned in the chapters on property and contracts, respectively. Such subjects as personal services and earnings of children do not seem to fit under any rule of the Restatement. This neglect, of course, is not accidental. Whereas Wharton and Story dedicated some space to the differences of civil and common law conceptions about this matter, subsequent writers seem to reduce the "status" of legitimacy to custodianship, which word, used in this connection, probably means no more than personal care and education, excluding maintenance (which otherwise may be included in the term). Exactly as with respect to matrimonial rules, the methods of civil law and common law are divergent; concentration of the effects of legitimacy under the aspect of family law in the Continental conception contrasts with dispersal into several topics in the American system. To account for all implications of the personal law, we have to base our survey upon the broader scope of the civil law doctrines.

1. Personal Law of Father

Wherever the unity of the family law is in the foreground of thought, the personal law of the father is deemed to determine the relation between both parents and the child, even when, as today, wife and child may have separate personal laws. This has remained the rule especially in Germany, Italy, Belgium, Japan,¹⁸⁷ and in the French dominant opinion,¹⁸⁸

¹⁸⁷ Nationality.

Germany: E.G. art. 19 sentence 1.

Italy: C. C. (1942) Disp. Prel. art. 20 par. 1.

Belgium: ROLIN, 2 Principes 100 no. 587, 646, POULLET 482 no. 374; Nouvelles Belges, 2 D. Civ. 759.

Japan: Law of 1898, art. 20.

China: Law of 1918, art. 15.

¹⁸⁸ France. Cass. (civ.) (Jan. 13, 1873) S.1873.1.13, Clunet 1874, 245, Cass. (civ.) (March 14, 1877) S.1878.1.25, Clunet 1878, 167 (in this case the

where the national law of the father governs the entire complex of relations, as well as in other countries, including Switzerland,¹⁸⁹ where the law of the father's domicile governs.

Correspondingly, in this country, "custody" is governed by the domiciliary law of the father,¹⁹⁰ although sometimes the opinion is expressed that parental power should always be subject to the local policy of the parties' momentary residence.¹⁹¹ The only exception to the rule of the foreign domicile should be urgent public policy, and this not so often as is generally claimed.

2. Cases of Different Nationalities

The now frequent cases where the parties have different personal laws are treated variously.

(a) Certain writers of the civil law countries, now followed by some legislations and courts, suggest that a personal law of the child different from that of his father should prevail.¹⁹² The favorite argument for this view is that paternal power in modern law serves only the welfare of the child; this is true, but it is no argument for the national or domiciliary law of the child.

parents were Frenchmen and the child a foreigner). See NIBOYET 784 no. 674, and for cases *ibid.* 784, no. 675; SURVILLE 472 n. 1; PILLET, 1 *Traité* 659 no. 328.

¹⁸⁹ Domicil: Switzerland: (for Swiss citizens abroad) NAG. art. 9. Treaty of Montevideo on international civil law, text of 1940, art. 18, correcting the existing art. 14.

¹⁹⁰ Restatement § 144 combines this rule with § 30 declaring that the child normally shares the father's domicile; thus no change of award of custody would occur regularly against the law of the father's domicile under § 145.

¹⁹¹ See especially 1 WHARTON §§ 253, 254. For England, WESTLAKE § 4 infers from the old case of *Johnstone v. Beattie* (1843) 10 Cl. & F. 42, 113, 114 that the authority of a foreign parent over his child living in England is recognized to the extent to which an English parent would have similar authority, whatever that means.

¹⁹² Finland: Law of 1929, § 19.

Código Bustamante art. 69 (with broad exceptions on which later).

Austria: see WALKER 786.

France: SURVILLE 468 no. 319, *ibid.* 472 no. 320 n. 2; DESPAGNET 821 no. 269 II; CHAMPCOMMUNAL, *Revue* 1910, 716, 718; WEISS, 4 *Traité* 27, 146, 164; Cour Paris (Aug. 5, 1908) *Clunet* 1909, 173.

The problems of the common law lie on another plane. British law, followed in this instance in Scotland,¹⁹³ recognizes the jurisdiction of the child's domicile as competent, although not exclusive. Likewise in this country, "the state of domicile of the child can change the custody of the child from one parent to the other, or to, or from both."¹⁹⁴ The courts apply their own substantive laws, but the doctrine of the child's domicile by operation of law corrects this apparent rupture of the system.¹⁹⁵ So long as the family lives together, there is no question at all; even if the community is disrupted by one parent abandoning the child or by separation or divorce of the parents, the child is considered domiciled with one of the parents.

(b) The Polish law has adopted the last national law common to both parties, as in conjugal matters.¹⁹⁶

(c) The recent Greek Code, elaborating the subject matter, makes the relation between legitimate parents and their child dependent: (i) upon the national law that was last common to the father and the child; (ii) in absence of such, upon the law of the father at the birth of the child; (iii) if the father is dead, upon the last law common to the mother and the child; and (iv) in absence of such, upon the law of the mother at the death of the father. This symmetrical solution solves all possible cases but is arbitrarily chosen. Moreover, in both this and the Polish regulations, paternal rights and duties are determined by a law that may be alien to both parties for the time being.¹⁹⁷

Brazil. 2 PONTES DE MIRANDA 110.

The Netherlands Rb. Rotterdam (May 18, 1934) W. 12791 (authority of the father, a foreigner, over a Dutch child, determined by Dutch law).

¹⁹³ Ponder v. Ponder [1932] Session Cases 233, 4 Giur. Comp. DIP. no. 123.

¹⁹⁴ Restatement § 145.

¹⁹⁵ Restatement § 33.

¹⁹⁶ Poland: Law of 1926 on international private law, art. 19; criticized by SCHNITZER 209 n. 1.

¹⁹⁷ Greece C. C. 1940, art. 18. See also *infra* p. 608.

(d) In another opinion, both laws are to be cumulatively applied.¹⁹⁸

(e) Also the law more favorable to the person sued on account of an obligation of parent-child relationship has been advocated.¹⁹⁹

(f) The law of the forum has been applied, where one party was a national of the forum, sometimes as an expedient because of the unsettled conflict laws, but in France as a declared policy where either the father or the mother is of French nationality, even though the child be a foreigner.²⁰⁰

3. Renvoi

Where the rule refers to foreign law, renvoi may be applied.²⁰¹

B. SCOPE OF THE RULES

I. Maternal Rights

The rules outlined above determine what rights the mother has during the father's lifetime and after his death.

Illustration: After the death of his German father, a son was entrusted to an uncle in Italy and later was released from his German nationality. It was held that, under German conflicts law, the mother, being of German nationality, retained

¹⁹⁸ 2 ZITELMANN 889; 4 FRANKENSTEIN 70, n. 161; CAVAGLIERI 242; FEDOZZI 502; Trib. Venezia (Jan. 30, 1932) 24 Rivista (1932) 106; see *contra*: RAAPE 464.

¹⁹⁹ E.g., Cass. Ital. (July 31, 1930) *Monitore* 1931, 132.

²⁰⁰ Cass. (civ.) (Jan. 13, 1873) S.1873.1.13, D.1873.1.297. Cf. ROLIN, 2 Principes 187 no. 649. Cass. (civ.) (March 14, 1877) S.1878.1.25, D.1877.1.385; cf. Clunet 1878, 167. App. Bordeaux (July 23, 1897) Clunet 1897, 1028.

Germany: German law applied where the mother is of German nationality and the child stayed with the mother in Germany, see RG. (Feb. 20, 1913) 81 RGZ. 373; OLG. München (Aug. 24, 1938) HRR. 1938, no. 1463.

²⁰¹ Germany: (although EG. art. 27 does not expressly order renvoi in this case), RG. (Dec. 29, 1910) JW. 1911, 208, 23 Z.int.R. (1913) 336 (Australian party); Bay. OBLG. (March 13, 1912) 13 Bay. OBLGZ. 136, 26 ROLG. 257; Bay. OBLG. (April 22, 1922) 42 ROLG. 126 (New York parties); KG. (April 17, 1914) 32 ROLG. 31 (Russian from Baltic province); Bay. OBLG. (Oct. 16, 1925) 24 Bay. OBLGZ. 270.

her maternal powers, so that no guardian was to be appointed.²⁰²

2. Personal Care

The content of paternal or maternal rights embraces "care, advice and affection,"²⁰³ in other words, personal care and education. Religious education is included, insofar as it is considered of private concern²⁰⁴ and the foreign law does not offend public policy by compromising religious freedom.²⁰⁵ The law governing parental relations extends to the action by which a parent entitled to custody sues the other parent for restitution of the child;²⁰⁶ in the prevailing opinion, also after a divorce, this law excludes the law under which the divorce has been granted.²⁰⁷

The French decisions are divided; the majority apply French law under the color of public policy,²⁰⁸ and an English court is likely to follow the same method in the case of a ward of the court.²⁰⁹ In the United States, it seems difficult to tell in what cases a court may be inclined to apply a foreign law. Correction and chastisement have always been indicated as an example of parental power limited by the territorial habits of the place where they are exercised.²¹⁰ Probably a

²⁰² OLG. Dresden (Jan. 16, 1900) 21 Ann. Sächs. OLG. 309 no. 15. Similar: A Dutch widow has no maternal power and therefore cannot be authorized by the court like a German mother to alienate her child's immovables, KG. (Oct. 10, 1907) 35 Jahrb. FG. A 15.

²⁰³ Simonds, J., *In re Frame* [1939] Ch. D. 700, 704.

²⁰⁴ KG. (July 26, 1904) 15 Z.int.R. (1905) 325.

²⁰⁵ DIENA, 2 Princ. 191; RAAPE 476.

²⁰⁶ RG. (Nov. 14, 1912) 68 Seuff. Arch. 163, 23 Z.int.R. (1913) 316 (Austrian law); RG. (May 23, 1927) IPRspr. 1926-1927, no. 79 (Bulgarian law; the form of procedure, however, is subject to the law of the forum).

²⁰⁷ *Supra* p. 533; Bay. ObLG. (Oct. 8, 1930) IPRspr. 1931, no. 84.

²⁰⁸ See Trib. civ. Seine (June 18, 1934) D. H. 1934. 471, Clunet 1935, 619 and the practice reviewed by BATIFFOL, *Revue Crit.* 1937, 427ff. who wishes that a foreign personal law be observed with vigilant criticism rather than to be neglected.

²⁰⁹ See *In re B-'s Settlement*, B- v. B- [1940] Ch. 54.

²¹⁰ 1 WHARTON § 254; Código Bustamante art. 72.

parent's renunciation of his right to visit would be held contrary to public order, as has been held in Germany.²¹¹

The requirement of parental consent to the child's marriage, as discussed earlier, is included in parental rights under civil law, while it is categorized with formalities according to the traditional British view and is, without qualification, subject to the law of the place of celebration under the American conflicts rules.

3. Duty of Providing a Dowry

Whether a parent has a duty to settle property as a dowry for his daughter, as he has under the German law but not under Dutch law, is a question determinable under the rules outlined above.²¹²

4. Protecting Interference by Courts

Many cases have dealt with the power of courts to protect children who are resident at the forum, against parents who are foreigners. German courts are ready to recognize that it is primarily a matter of the personal law of the parent, whether and under what conditions parental rights can be abridged or terminated. Such remedies as are provided in the Italian or the Dutch civil codes have been found sufficient.²¹³ Where the national law did not offer an adequate basis for intervention of the German court, temporary measures were always permitted.²¹⁴ Incidentally, where the welfare of a

²¹¹ KG. (Nov. 14, 1930) IPRspr. 1931, no. 8.

²¹² RG. (April 12, 1923) Leipz. Z. 1923, 449.

²¹³ KG. (June 5, 1921) 53 Jahrb. FG. A 56 (Italian law); KG. (Nov. 28, 1913) 45 Jahrb. FG. A 18 (Dutch law). See also KG. (Sept. 6, 1935) JW. 1935, 3483 (applying Austrian law); Bay. ObLG. (Dec. 6, 1933) JW. 1934, 699 and Bay. ObLG. (Feb. 14, 1934) JW. 1934, 1369, IPRspr. 1934, nos. 63, 64 (Lebanon law).

²¹⁴ RG. (May 23, 1927) IPRspr. 1926-1927, no. 79 and cited writers. In a constant practice sec. 63 par. 1 (2) of the Law on Youth Welfare of July 9, 1922, providing for emergency education of depraved children, is applied to foreigners. See RG. (June 30, 1927) 117 RGZ. 376; RG. (May 22, 1933) JW. 1933, 45, 5 Giur. Comp. DIP. 137 no. 51.

child resident within the country appeared to be menaced, public policy was often invoked in favor of the local remedies, but this view has been challenged recently.²¹⁵

A similar practice in favor of the personal law exists, for instance, in the Netherlands.²¹⁶ In Switzerland parents domiciled within the country are subject to Swiss law under the domiciliary principle itself.²¹⁷

The *lex fori* at the domicile of the child simply is applied in the United States²¹⁸ for controlling and transferring custody. The Bustamante Code expressly reserves the law of the forum, depriving the parents of their power "by reason of incapacity or absence, or by judgment of a court."²¹⁹ To justify the similar practice of the French²²⁰ and the Belgian²²¹ courts, an author who is otherwise not favorable to extending public policy has adduced that mistreatment of a child arouses public indignation and harms morals.²²²

Also in the countries prepared to observe foreign law, temporary residence is sufficient not only to bring provisional legal aid to the child so long as the national country does

²¹⁵ KG. (Jan. 12, 1934) IPRspr. 1934, no. 62 denies jurisdiction as to foreigners if any one of the parties interested in an order regulating custody or right of visitation is not to be found within the territory of the state. OLG. München (May 18, 1938) HRR. 1938, no. 1281, (although the child was at the forum, depriving the Bulgarian father of his powers was held excluded because the Bulgarian law did not recognize such a measure).

²¹⁶ The Netherlands: Rb. den Haag (Jan. 13, 1939) W. 1939, no. 286 (although the wife was Dutch and the parties lived in the Netherlands, Austrian and German laws were applied as the child's national law, the mother was entrusted with the personal care, and the father excluded from visiting the child).

²¹⁷ BG. (Sept. 29, 1927) Praxis 1927, 456. The powers of a Dutch father (domiciled in the Netherlands) are characterized under Dutch law: BG. (Feb. 3, 1939) 65 BGE. I 13.

²¹⁸ Restatement § 148.

²¹⁹ Art. 72.

²²⁰ France: Law of July 24, 1889 as amended Nov. 15, 1921; on the application to foreigners see PILLET, Clunet 1892, 5, and 1 Traité 660 no. 328; WEISS, 4 Traité 157; App. Colmar (March 28, 1935) Clunet 1936, 642.

²²¹ Belgium: Law of May 15, 1912 on Protection of Minors; for application of provisions on the forfeiture of parental power to foreigners see App. Liège (July 10, 1917) Pasirisie 1917.2.254; Trib. Liège (Nov. 23, 1917) Pasirisie 1918.3.82.

²²² BATIFFOL, Revue Crit. 1937, 418, 429.

not assume its care,²²³ but also to assist a father or mother in coercitive actions against a child, according to the local law.²²⁴

5. Parental Interest in Child's Property

The Roman paternal "*dominium*" in all family property had given way in the imperial period to a right of "administration and enjoyment" upon property acquired by the children and not excepted from this right. Property either of infants or of children less than eighteen years old is still subject to such paternal encroachment in many civil law countries,²²⁵ including Louisiana.²²⁶ By some American statutes,²²⁷ a parent has control of the property given by him to the child, although only as an administrator. Such control in the predominant interest of the child, with or without²²⁸ duty to account for the revenue, is frequent in modern legislations.²²⁹ Common law and the legislations of Sweden and Czarist and Soviet Russia do not contain any such legal powers of parents, but at common law parents have a right to the earnings of the child, which right affects the property as well as produces obligations. In other countries, on the con-

²²³ For this situation see Bay. ObLG. (Feb. 14, 1934) IPRspr. 1934, no. 64; Swiss BG. (Feb. 3, 1939) 65 BGE. I 13 (where it is stated that art. 7 of the Hague Convention on custody does not cover the case).

²²⁴ Italy: Cass. Torino (April 13, 1909) Clunet 1910, 673 (Spanish parties). Germany: KG. (Dec. 16, 1938) JW. 1939, 350 (Danish mother and daughter).

²²⁵ E.g., France: C. C. art. 384.

Germany: BGB. §§ 1649, 1652.

Switzerland: C. C. art. 292.

Italy: C. C. (1865) art. 228, C. C. (1942) art. 324.

Argentina: C. C. art. 287 (new 321).

Brazil: C. C. art. 389.

Mexico: C. C. art. 430.

Peru: C. C. (1936) art. 398, 8.

Japan: C. C. arts. 890, 891.

China: C. C. art. 1088 par. 2.

²²⁶ La. Civ. Code Ann. (Dart. 1932) art. 223.

²²⁷ Arkansas, Kansas, Missouri; see 4 VERNIER 23 § 232.

²²⁸ E. g., Austrian Allg. BGB. § 150.

²²⁹ See VEITH, 4 Rechtsvergl. Handwörterb. 782.

trary, earnings are a favorite exception to the management or usufruct of the parents.

In the law of conflicts, immovables must be treated separately, because of their particular position at common law.

(a) That immovables are governed by the *lex situs* also in regard to the paternal rights,²³⁰ was a doctrine shared by many statutists and older French authors.²³¹ In more recent times, no civil law text has followed this doctrine,²³² except the Montevideo Treaty of 1889;²³³ its new draft of 1940 joins the general doctrine of the civil law, that the entire assets of the child are governed uniformly by the personal law.²³⁴ This is the domiciliary or national law, ordinarily of the parent, while in the *Código Bustamante* it is again the law of the child.²³⁵ For instance, the usufructuary interest allowed to a parent by the French Civil Code (art. 384) is said to depend upon the personal law of the parties.²³⁶

But how is this mutual recognition among the countries adhering to the personal law to be effectuated? For illustration, the French and German paternal rights in the real property of a legitimate child are of different nature. The French right is an ordinary usufruct; the German one has a special character and is not recorded in the land register; they

²³⁰ STORY § 463; WESTLAKE § 166.

²³¹ See COLMET-DAAGE, *Revue de droit français et étranger* 1844, 401, 406; TROPLONG, 2 *Droit civil expliqué, privilèges et hypothèques*, no. 429 (the legal hypothec upon French immovables of a guardianship has been established abroad, since the "statute" is a "real one").

²³² Legal provisions in Germany: EG. art. 19; Poland. Law of 1926 on international private law, art. 19; Italy: C. C. (1942) Disp. Prel. art. 20 par. 1; *Código Bustamante* art. 70.

Doctrine and practice in Belgium and France: see 6 LAURENT 36 § 15; ROLIN, 2 *Principes* 183 no. 646; WEISS, 4 *Traité* 150, 151; Cass. (civ.) (Jan. 13, 1873) D.1873.1.297; Cass. (civ.) (March 14, 1877) S.1878.1.25, D.1877.1.385, Clunet 1878, 167.

For the provisions of German EG. art. 28 and Polish Law of 1926, art. 19 par. 3 respecting the Anglo-American treatment of immovables, see *supra* p. 342.

²³³ Treaty on international civil law (1889) art. 15.

²³⁴ Treaty on international civil law (1940) art. 19.

²³⁵ Art. 70.

²³⁶ SURVILLE 469 no. 319.

differ also as to the periods of duration. If the father is of French nationality, should his right be transformed with respect to German immovables into a German "*Nutznießung*"?²³⁷ This suggestion would amount to applying the law of the situs as at common law. The system of personal law requires rather that the French type of right be recognized in its true nature in Germany;²³⁸ consequently it should be recorded in the German public register to satisfy the requirement of the law of situs for creating an ordinary usufruct.²³⁹

(b) Personal property of the child is submitted everywhere to the personal law, i.e., the domiciliary law²⁴⁰ or the national law²⁴¹ of the parent.

The *Código Bustamante* limits the domain of the personal law, by the proviso that no prejudice shall arise in foreign countries "to the rights of third parties which may be granted by local law and the local provisions in respect to publicity and specialty of mortgage securities."²⁴² In the other countries this limitation is included in the rules on property themselves.

6. Authority of Parent

A parent generally is entitled to represent his child in private transactions or court proceedings dealing with its personality as well as its property. The system of personal law embraces all connected problems, such as the question whether the parent is able to act on behalf of the child by force of law, or must be appointed guardian, or needs authorization by a court or a family council for the special purpose.

Illustration: A German prince had a minor son who was a British subject. The question for what transactions on behalf of the son's property the father needed the consent of the

²³⁷ This was suggested by RAAPE 463, 476, 487.

²³⁸ RABEL, 5 Z.ausl.PR. (1931) 241, 278.

²³⁹ 4 FRANKENSTEIN 49.

²⁴⁰ 1 WHARTON § 255 (adhering to German writers).

²⁴¹ See e. g., German EG. art. 13; NIBOYET 785 no. 675.

²⁴² Art. 71.

court controlling guardianship was decided by a German court in accordance with the father's German law. (EG. art. 19; BGB. § 1643).²⁴³ To the same effect, an English father,²⁴⁴ a Dutch mother,²⁴⁵ and an American father²⁴⁶ were deemed, according to their respective laws, to be without authority to represent their children, so that temporary trustees had to be locally appointed.

The practical difficulties and great costs involved in procuring sufficient authority in some states of this country have thus come to be noticed in German courts. In one case, for this reason, the American father preferred to let the child's property remain in Europe.²⁴⁷

It is doubtful, however, whether such observance of foreign law is usual in many countries. Common law conceptions are opposed to subjecting dealings with immovables to the personal law, and this view is shared in certain civil law countries.²⁴⁸ As to movables, the law governing contracts enters into competition. Finally, peculiar considerations of convenience have a strong influence upon all rules respecting administration of estates. For these reasons, the subject ought not to be discussed further at this place.

7. Duties of Support

Support due to children by parents and to parents by children is in most countries the subject of specific obligations de-

²⁴³ KG (March 14, 1910) 39 Jahrb. FG. A 198 (expressly rejecting the application of the child's law).

²⁴⁴ LG. Darmstadt (Sept. 9, 1907) 9 Hessische Rechtsprechung (1909) 13 no. 6.

²⁴⁵ KG. (Dec. 19, 1907) 35 Jahrb. FG. A 15, 19 Z.int.R. (1909) 239, 242.

²⁴⁶ AG. Tauberbischofsheim (June 14, 1910) 20 Z.int.R. (1910) 545. Other German cases: RG. (Feb. 9, 1925) 110 RGZ. 173 (a Polish father needed authorization by the Polish court for disposing of a German immovable under the Polish law). RG. (March 28, 1931) JW. 1932, 588 (an Italian mother, living with the child in Germany, needed authorization by an Italian court). KG. (April 8, 1914) Recht 1914, no. 2691 (an Austrian father must have the consent of court for repudiating the child's share in a succession on death, etc.).

²⁴⁷ OLG. Dresden (March 4, 1913) 35 Ann. Sächs. OLG. 63, 13 Z.int.R. (1903) 467.

²⁴⁸ In the Netherlands the personal law of the parent governs also in respect to immovables; see for cases VAN HASSELT 91 § 9.

pendent on legitimacy.²⁴⁹ There is the same contrast as in matrimonial matters,²⁵⁰ between the rule asserted by the Restatement (§ 458)²⁵¹ of applying the law of the forum and the systems established upon the assumption of familial duties to support.²⁵² In such countries as France, the law of the forum is applied only as a check upon the foreign national law under the theory of public policy, but it operates on a large scale.²⁵³ Also in England, it has been considered a common law rule that "liability of a father to maintain his son must be determined by the law of the place of the father's domicil."²⁵⁴ It has been inferred from this rule that generally any alimentary liability is governed by the law of the domicil of the person against whom a claim is made.²⁵⁵ This seems a doubtful conclusion. Should not the law of the head of the family govern?

8. Determination of Domicil of the Child

The old rule of private law confers upon the child the domicil of his father by operation of the law, irrespective of the factual circumstances.²⁵⁶ This is still so much a normal

²⁴⁹ In the United States, most statutes provide maintenance for natural children while in twenty jurisdictions only legitimate or legitimized children have the right to support, see 4 VERNIER § 234.

²⁵⁰ *Supra* pp. 324-325.

²⁵¹ For important complements, see Restatement, New York Annotations 306 § 457.

²⁵² Germany: According to the dominant opinion, EG. art. 19 is applied (law of the parent); see LG. Frankfurt (Oct. 29, 1931) JW. 1932, 2307, IPRspr. 1932, no. 91. Italy: Cass. (July 31, 1930) *Monitore* 1931.1.132 n. 10 (prefers the personal law more favorable to the debtor!)

²⁵³ NAST, 1 *Répert.* 400 no. 38. In Belgium: the same trend of the courts is noticed by POULLET 481 no. 373, who advocates the standard of the forum only as minimum award; cf. *supra* p. 324.

²⁵⁴ Salter, J., in *Coldingham Parish Council v. Smith* [1918] 2 K. B. 90, 96.

²⁵⁵ DICEY 551 Rule 143 (i) (2), 550 n. i.

²⁵⁶ Thus the German BGB. § 11 says simply: A legitimate child shares the father's domicil. Restatement § 30. Swiss BG. (June 6, 1907) 33 BGE. I 371, 378. The English cases have not properly decided whether a child really retains its father's domicil as of the birth invariably throughout minor age; see FOSTER, "Some Defects in the English Rules of Conflict of Laws," 16 *Brit. Year Book Int. Law* (1935) 84 at 87.

conception that in interpreting the Treaty of Versailles a minor has been considered resident at the place where his father or guardian was residing.²⁵⁷ Modern conceptions, however, have established exceptions to the rule in more and more countries.²⁵⁸ Moreover, the cases in which the child shares in the domicile of the mother are not identical in the various jurisdictions.

Of general interest is the case where the husband of the mother contests the child's legitimacy by a suit at the court of his own domicile on the ground that this is the legal domicile of the child. It has been objected that the law there in force is operative only when the child is born in lawful wedlock, which the plaintiff denies. However, the German Reichsgericht encounters this argument of a vicious circle (unduly popular in the law of conflicts) by the consideration that a child is to be regarded as legitimate so long as its position is not destroyed by judgment.²⁵⁹

Characterization. But the main question is, which law, the personal law or the law of the forum, should operate in determining domicile by force of "law"? The general idea prevailing in this and other countries has been that, for the purposes of jurisdiction and venue, "domicil" has to be characterized according to the local law of the forum.²⁶⁰ The Reichsgericht, however, declares that the foreign family law, as the personal law of the father, is applicable even though the problem is of a procedural character.²⁶¹ Jurisdiction in particular for disputing legitimacy, thus, becomes a privilege of the court at a domicile recognized by the country of the parent, a limi-

²⁵⁷ Anglo-German Mixed Arbitral Tribunal (Oct. 19/Dec. 14, 1927, Feb. 1, 1928) 7 Recueil des décisions des tribunaux arbitraux mixtes 502, commenting on art. 296 of the Treaty of Versailles.

²⁵⁸ Cf. Restatement § 31ff.

²⁵⁹ RG. (Jan. 12, 1939) HRR. 1939, no. 376.

²⁶⁰ France: App. Toulouse (May 22, 1880) Clunet, 1881, 61.

²⁶¹ RG. decision, n. 259 *supra*, and former decisions.

tation of jurisdiction highly desirable in matters of status regarding the entire family.

Other difficulties have been realized in practice, where a parent having custody deserts the child. To impose upon a child the domicile of an emigrated father, as a German court believed to be the law,²⁶² is indefensible. The Restators have found a better answer, but they maintain a fictitious domicile of the child at the place of the parent who last abandoned it.²⁶³ A wholly satisfactory solution would probably be found, if the habitual residence of the child were substituted for the legal domicile, whenever the family life is definitively disrupted.

9. Tort

It may be briefly noted in recalling the analogy of marital relations that in this country actions for tort between parents and child as well as responsibility of a parent for wrongful acts of a child are purely tort matters, while in civil law they are primarily incidents of the family law.

C. CHANGE OF STATUS

1. Mutability of Incidents of the Child's Status

As we have seen, legitimacy once created under the personal law of the parent, either by the birth of the child or by legitimation, is a permanent status. However, the content of the rights and duties flowing as incidents from this status is, in the dominant opinion, modified by a change of the personal law deemed to be decisive for the child's status.²⁶⁴ The same is true where custody has been awarded or transferred by court order; the meaning of this custody is altered, if parent and child (at common law) move to another jurisdiction or (in most civil law countries) change their nationality, even

²⁶² Bay. ObLG. (Feb. 14, 1934) JW. 1934, 1369, IPRspr. 1934, no. 64.

²⁶³ Restatement § 33, to be read with Restatement §§ 21, 54 and 109.

²⁶⁴ The subject is treated principally by RAAPE 464.

though the decree regularly will be recognized until re-examination of the situation of the child at the new forum of the parties.

This phenomenon is the same as the better known change of incidents of personal property rights where a movable is transferred to another state. We have encountered a third instance in the transformation of non-pecuniary matrimonial relations.²⁶⁵ Such mutability is a general feature of rights of an absolute character.

Illustrations: (i) An American citizen and his fourteen-year-old daughter, a rich heiress from her mother, move to France. Hereby the father acquires (by change of domicile and renvoi) a usufruct upon the movables and French immovables belonging to the daughter and not subject to a trust. The usufruct is recognized in all other countries.

(ii) An Italian married couple went to Hungary and acquired Hungarian nationality in order to obtain divorce. Afterwards both were restored to Italian citizenship. By this fact, Hungarian law lost any influence upon further decisions concerning the custody over the children.²⁶⁶

2. Different Personal Laws

In the case where only one of the two parties, either the parent or the child, changes his status, the decision depends on the person whose law governs under the conflicts rule.

Illustration: A minor German girl, by her marriage to a Greek national, lost German and acquired Greek nationality. But under her new Greek status, she neither became of age nor subject to a guardianship of her husband. A German court held that as article 19 of the Introductory Law to the Civil Code considered only the national law of the parent, the change of nationality did not affect the father's authority to act on her behalf.²⁶⁷

²⁶⁵ *Supra* p. 302.

²⁶⁶ Trib. Napoli (July 13, 1932) 25 *Rivista* (1933) 281.

²⁶⁷ OLG. Dresden (June 28, 1926) *IPRspr.* 1926-1927, no. 78, cf. BGB. § 1630 par. 1 and § 1633.

This rule, however, has been replaced in the Polish and Greek Codes by rules referring to the last national law common to both parties.²⁶⁸

Illustration: In the example just given, the result in a Greek court would be the same. But if the father alone changed to American nationality and not his daughter, their relations would under the Greek rule remain governed by German law, both before and after her marriage to the Greek national.

This imitation of a rule good for protecting a wife against her husband's arbitrary change of status is questionable. The father is free to take minor children into a new citizenship without their consent. Why then, should he be bound by their unchanged nationality? Nevertheless, German law has a similar rule, which forms an exception in favor of the *lex fori*; if a German parent changes nationality while the child retains German nationality, German law governs.²⁶⁹

3. Non-retroactivity

By reasonable interpretation of the conflicts rule, a change of status does not operate with retroactive effect upon the incidents of parental relations. The name of the child, an emancipation performed under the former law, income from the child's property once devolved to the parent,²⁷⁰ remain unaffected. For instance, under the German Civil Code (§ 1620), a daughter has a right to a trousseau in the case of marriage. The Italian Supreme Court granted a suit of a girl, formerly of German nationality but Italian by marriage, against her German mother, on the ground that the marriage only perfected the mother's pre-existent obligation.²⁷¹ The German Reichsgericht decided to the same effect in a case

²⁶⁸ *Supra* p. 595.

²⁶⁹ EG. art. 19 sentence 2. No analogous application to foreign children is permitted in the prevailing opinion, see LEWALD 132 no. 183; RAAPE 469.

²⁷⁰ STAUFFER, NAG. 62 no. 2.

²⁷¹ Cass. Ital. (July 31, 1930) 5 Z.ausl.PR. (1931) 844.

where a German father had acquired Swiss nationality.²⁷² Such interpretations, restricting the impact of the change of status, are certainly more valuable than any theory of vested rights of parents and children.

No American doctrine on this subject seems to exist. Results similar to those described could be reached by an analogy to the doctrine obtaining in the case of matrimonial property. Thus each single incident would be governed by the law of the parent's domicile at the time of the incident.

²⁷² RG. (April 12, 1923) Leipz. Z. 1923, 449.

CHAPTER 16

Illegitimate Children¹

I. MOTHER AND CHILD

A WOMAN and her child born out of wedlock are considered to be in blood relationship; in the legislations of the French type, however, no claim can be based upon it before the mother recognizes the child. The relationship is characterized either as "illegitimate" and of a special nature or assimilated to the regular mother-child relation constituted by wedlock. Differences exist also in almost every particular. They are mirrored by the multiformity of the conflicts rules.

I. Contacts

The law of the forum is applied in the United States² and under the present Montevideo Treaty.³

¹ Comparative substantive law:

ROBBINS and DEÁK, "The Familial Property Rights of Illegitimate Children: A Comparative Study," 30 Col. L. Rev. (1930) 308-329 (a historical summary).

FREUND, *Illegitimacy Laws of the United States and Certain Foreign Countries*, U. S. Dep't of Labor, Children's Bureau, Publ. No. 42 (1919).

Illegitimacy, Standards of Legal Protection for Children Born out of Wedlock, Report of Regional Conferences, U. S. Dep't of Labor, Children's Bureau, Publ. No. 77 (1921).

LUNDBERG, *Children of Illegitimate Birth and Measures for their Protection*, U. S. Dep't. of Labor, Children's Bureau, Publ. No. 166 (1926).

TOMFORDE, DIEFENBACH, WEBLER, *Das Recht des unehelichen Kindes und seiner Mutter im In-und Ausland* (ed. 4, 1935).

REXROTH, *Uneheliche Kinder*, 6 *Rechtsvergl. Handwörterb.* (1938) 633-676.

² U. S. Restatement § 454.

³ Treaty of Montevideo on international civil law (1889), art. 18: The rights and duties resulting from illegitimacy are governed by the law of the state in which they are claimed to be exercised.

Nicaragua: C. C. Tit. Prel. art. VI (10).

Código Bustamante art. 63 as to the declarations of maternity.

Most countries refer to the personal law of the mother, tested by her domicile ⁴ or nationality.⁵

Minority solutions refer to the child's personal law ⁶ or resort to the so-called distributive application of both parties' laws, so as to determine the duties of either party by his or her law.⁷

The English law is *sui generis*. Only English law is applied, and then only if the child is born in England or, if born abroad, of English parents.⁸

2. Scope

The applicable law covers the questions:

Whether the mother enjoys a power analogous to that of a legitimate father;

What other rights she may have over the child's person and property;⁹

Whether the child bears the name of the mother,¹⁰ and

⁴ Denmark: BORUM and MEYER, 6 Répert. 220 no. 53. Also BAR, § 204 was of this opinion.

⁵ Austria: 1 EHRENZWEIG-KRAINZ § 28 n. 38; WALKER 814 n. 42.

Germany: EG. art. 20 with regard to Germans but generally extended to foreigners. RG. (May 13, 1911) 76 RGZ. 283; KG. (July 9, 1924) 50 Z. Ziv. Proz. (1926) 337; OLG. Karlsruhe (Nov. 26, 1926) 37 Z.int.R. (1927) 388.

Greece: C. C. (1940) art. 19: last common national law, in absence of such the national law of the mother at birth.

Italy: C. C. (1942) Disp. Prel. art. 20 par. 1.

Poland: Law of 1926, art. 20: Where the laws of mother and child differ, the last common national law.

The Netherlands: Rb. Amsterdam (April 17, 1936) W. 1936, no. 721 (speaking of a case where both parties were of the same foreign nationality at the time of birth of the child).

⁶ Finland: Law of December 5, 1929, § 20.

Código Bustamante: art. 64 as to the name of the child.

⁷ Japan: Law of June 15, 1898, art. 18; China: Law of Aug. 5, 1918, arts. 16, 17. For details see *infra* p. 615.

⁸ 2 HALSBURY (1938) 583 no. 804.

⁹ Rb. Haag (Nov. 29, 1934) W. 1936, no. 652 (authority of the mother to act knowledged under German law, while under Dutch law a guardian ought to have been appointed).

¹⁰ Código Bustamante art. 64 (law of child).

whether the mother's husband may give his name to the child;¹¹

Whether it shares her domicile by force of law;¹² and
The question of alimentary duties of each party.

As the above mentioned conflicts rules differ greatly from those on legitimacy, a court may have to consider a person an illegitimate child of his mother under one law and a legitimate child of his father under another law, as, for instance, by German conflicts rules, where the father is of Finnish nationality and the mother a German.¹³ This split result approaches American principles.¹⁴ Equally surprising is the outcome in a French case where a Polish man and an Italian woman both recognized their child. By the father's recognition the child acquired Polish nationality, and consequently Polish law was applied; under Polish municipal law the mother had authority to act in the name of the child, while under her own Italian law this authority would have belonged to the father.¹⁵

The inclination of French courts to apply French law against all their own principles has inspired one of the most objectionable decisions of the Court of Cassation. A French mother recognized her illegitimate daughter, after the latter's marriage to an Englishman had made her a British subject, and sued for support. Although a reciprocal action of the daughter would have been determined (and denied) by English law, the mother's claim for aliments was granted under French law, which, in the court's conception, conferred upon the mother "an imprescriptible right of recognizing the child."¹⁶ The fact that the affection of this mother for her

¹¹ German courts and prevailing doctrine, see RG. (Nov. 23, 1927) 119 RGZ. 44; NUSSBAUM, IPR. 175; RAAPE 497ff.

The Netherlands: Rb. Amsterdam (April 25, 1923) W. 11072.

¹² HABICHT 158.

¹³ RAAPE 500.

¹⁴ *Supra* pp. 559-560.

¹⁵ Triv. civ. Nice (Feb. 2, 1903) Clunet 1903, 859. Cf. Italian C. C. (1865) art. 184 par. 2.

¹⁶ Cass. (civ.) (March 8, 1938) Revue Crit. 1938, 653, Nouv. Revue 1938, 120, 7 Giur. Comp. DIP. no. 124, criticized by BATIFFOL, Revue Crit. 1938, 655.

daughter was evidently discovered only after about twenty years when wealth had come to the latter should exclude any equitable considerations that might otherwise move a court.

Change of Status. As a rule, a change of the personal law on which the choice of law depends is determinative, the relationship between mother and child, of course, being determined originally according to the law applicable at the time of the birth. Yet, the German Code (EG. article 20) reserves application of German law in the case where the mother becomes a foreigner and the child remains a German. This contrasts unfavorably with the Dutch conceptions under which a foreign child retains what rights it acquired by birth, although the mother may acquire Dutch nationality and not recognize her child according to Dutch law.¹⁷

II. FATHER AND CHILD

1. Classification

Today in the domestic laws, some right of a child to support by his illegitimate father is universally known. The nature of the claim varies greatly, however; it may be based on a natural obligation, a liability to exonerate the public relief organizations from avoidable charges, tortious acts accompanying the cohabitation (rape, seduction, *et cetera*), the simple fact of cohabitation itself, or the fact of impregnation. In Norway and Finland, an obligation to pay alimony is imposed on any man who has cohabited with the mother during the critical period (so-called pay-father), the liability being entirely severed from any presumption of paternity.

In addition to the support for the child, if a man is assumed to be the true father, other incidents may be included in the relationship between the parties, such as those concerning the name of the child, care and education, marriage impediments, inheritance rights of the child, alimentary rights of the father,

¹⁷ VAN HASSELT, Supplement 32.

et cetera. The municipal laws acknowledge more or fewer of such incidents, and some of them establish a gradation according to different situations. For instance, the Swiss Civil Code includes, besides the ordinary protection of children born out of wedlock, the award of "status" to a child either by recognition or, in certain cases such as seduction, by judgment (art. 323). A special kind of "illegitimate relationship" is created with effects on name, care and education, and nationality; courts may even confer parental power on the father. Also, the ordinary lawsuit for support may vary in correspondence with the varying structure of the rights allotted. The child may be provided with a simple action for payment of money, or with an action seeking a formal declaration of paternity, or, combining these two types of remedy, with a petition for incidental declaration of paternity constituting *res judicata* and for adjudication of payments.

Many other differences of the municipal regulations have made the corresponding conflicts rules a field of utter confusion, often deplored; public policy, playing a dominant role adds complication.

In most countries, the conflicts rule is unsettled. Where statutory provisions exist, they are imperfect or need construction. As a typical example, article 21 of the German Introductory Law refers to the mother's national law only for the purpose of determining the support duty of the father. Extension of this rule to the entire relation between father and child was assumed for a time and embodied in the Polish Law of 1926 (article 21, paragraph 1). Opinion prevailing now prefers for substantial reasons, to take the limitation of the rule literally and to reserve all problems other than those related to support to the father's personal law.¹⁸ An action

¹⁸ See LEWALD 145 no. 203; RAAPE 529ff.; M. WOLFF, IPR. 137; LG. Königsberg (May 30, 1934) IPRspr. 1934, no. 66. *Contra*: NUSSBAUM, D.IPR. 176 n. 4, against whom 4 FRANKENSTEIN 108 n. 2.

for support, however, although combined with a demand for a preliminary declaratory statement of paternity, is considered to fall under the enacted rule.¹⁹

Recent legislators are aware of the broader sphere of the problem. The Finnish Law of 1929 establishes different rules, the mother's personal law governing generally, while the illegitimate father's law determines inheritance rights.²⁰ The *Código Bustamante* assigns to the personal law of the child the rules concerning its right to a name, determining the proofs of filiation, and regulating the child's inheritance (article 57), but applies the *lex fori* to the right of maintenance (article 59).²¹ Also, a draft of the Greek Civil Code made similar distinctions; the Code rejecting them is clearly intended to cover the entire ground, like the Polish law.²² A similar distinction follows from the Swiss statute, which subjects status questions, especially of domiciled foreigners, to the national law (NAG. article 8), but purely alimentary suits, according to general principles, to the law of the defendant's domicil.²³ The courts classify the above mentioned action for declaration of "status" as a status in the sense of the first group, and they therefore treat it as belonging to exclusive Swiss jurisdiction.²⁴ The Dutch *Hof den Haag* recognized in 1937 an ordinary Swiss judgment condemning a Dutchman as illegitimate

¹⁹ LG. Frankfurt a. M. (Aug. 17, 1932) JW. 1933, 191, IPRspr. 1933, no. 48.

²⁰ HERNBERG, 7 Z.ausl.PR. (1933) 107.

²¹ In the French and English translations, 86 League of Nations Treaty Series (1929) No. 1950, pp. 137, 270, article 59 is incorrectly restricted to legitimate children. The French translation of article 57 is mistaken in rendering "legitimidad" by "paternité," 86 *ibid.* p. 137.

²² Draft, art. 25 par. 2 (Revue Crit. 1938, 348); see MARIDAKIS, 11 Z.ausl.PR. (1938) 124; C. C. (1940) art. 20.

²³ BG. (Oct. 22, 1919) 45 BGE. II 503; BG. (May 15, 1925) 51 BGE. I 105; BG. (March 24, 1927) 53 BGE. II 89, 92.

²⁴ The action is available only against Swiss nationals before Swiss courts; see BG. (July 6, 1916) 42 BGE. II 332; BG. (Oct. 22, 1919) 45 BGE. II 503; BG. (Nov. 22, 1934) 60 BGE. II 338. Where the defendant is an Italian, Italian law governs, and an action for declaration of status, if any, must be instituted in Italian courts, Cour de Justice, Genève (June 21, 1928) 36 SJZ. (1939-1940) 203 no. 141.

father to pay alimony, although he would have been able to prove the defense of *plurimum concumbentium* (several cohabitants), exonerating him under Dutch, though not under Swiss law; the problem was thought to concern the status of the child, determinative in the opinion of the Court.²⁵ The Dutch Supreme Court, however, subsequently held that support is not relative to status, because a preliminary declaration of paternity is no more than a mere fact; hence, the law of the defendant Dutchman was applied.²⁶

Without doubt, a conflicts rule limited to the duty of support is insufficient to cover the field, and it may well be that the contacts should be chosen differently for support and the other incidents of illegitimate parenthood.

2. Contacts

The rule applying the law of the place of conception was originated by the tort idea in European common law practice²⁷ and is still applied in Sweden.²⁸ Sometimes, the birthplace replaces the less practical place of conception.²⁹

Numerous rules subject the entire matter to the law of the forum,³⁰ either because the matter is regarded as of imperative policy or because it lacks a convincing classification.

²⁵ Hof den Haag (April 26, 1937) W. 1937, no. 538.

²⁶ H. R. (April 1, 1938) W. 1938, no. 989. For criticism see VAN DER FLIER, Grotius 1939, 190 and citations. An analogous decision: Hof Arnhem (Nov. 15, 1938) W. 1939 no. 299 (illegitimate child born in Czechoslovakia, and of Czech nationality, defendant of Dutch nationality; the alimentary duty belongs to the patrimonial law; the personal law includes, at the most, the declaration of paternity).

²⁷ Former German common law: LG. Frankfurt a. M. (Jan. 25, 1893) 3 Z.int.R. (1893) 511.

²⁸ Swedish Sup. Ct. (Högsta Domstol) (Aug. 18, 1915) 2 Z.ausl.PR. (1928) 871 (Swedish defendant, cohabitation in Hamburg; *exceptio plurimum concumbentium* admitted according to German law).

²⁹ The Netherlands: H. R. (Feb. 7, 1919) W. 10393, N. J. 1919, 322. Italy, interprovincial law: Cass. (April 30, 1926) Giur. Ital. 1926, I, 1, 1055.

³⁰ SAVIGNY § 374 at p. 279; tr. by GUTHRIE p. 254.

United States: Restatement § 454: "No action can be maintained on a foreign bastardy statute." Código Bustamante art. 59 (for aliments).

Austria: OGH. (Feb. 19, 1924) 6 SZ. no. 66; OGH. (March 4, 1937) 19 SZ. no. 70; WALKER 815 and in 1 KLANG's Kommentar 328. But see *infra* n. 38.

Personal law is applied in very different conceptions, as determined by:

The domicile of the mother at the time of the conception or birth; ³¹ the domicile of the man ³² at the time of the conception or the birth; ³³ the domicile of the man as defendant at the time of the commencement of the action; ³⁴ the national law of the mother; ³⁵ of the child; ³⁶ of both cumulatively; ³⁷

Denmark: Sup. Ct. (Højesteret) (June 22, 1915) 2 Z.ausl.PR. (1928) 865; Criminal and Police Court Copenhagen (May 4, 1897) 10 Z.int.R. (1900) 293.

Finland: Law of 1929, § 21 sentence 1 (for aliments); § 21 sentence 2 (for all claims against Finns).

The Netherlands: Rb. Amsterdam (June 29, 1925) W. 11424; but *contra* Hof den Haag (May 20, 1927) W. 11814; Rb. Maastricht (April 28, 1932) W. 12684 and almost all other decisions.

The Treaty of Montevideo (1889) art. 18, Treaty of Montevideo (1940) art. 22 provide that the rights and duties concerning illegitimate filiation are governed by the law of the state in which they ought to be "effective."

Similar, Nicaragua C. C. Tít. Prel. art. VI (10). It is highly obscure as to what this means.

³¹ Domicil of the mother:

(a) At the time of birth; older Prussian practice, see Gebhardsche Materialien 216.

(b) At the time of the conception: last Prussian practice before 1900 following the thoroughly considered Plenary decision of the Obertribunal (Feb. 1, 1851) 37 Entsch. no. 1; FOERSTER-ECCIUS 1 Theorie und Praxis des Preussischen Privatrechts (ed. 5, 1887) 64; alleged Norwegian practice, but controversial, see CHRISTIANSEN, 6 Répert. 576 no. 128.

³² Domicil of the man:

England: Coldingham Parish Council v. Smith [1918] 2 K. B. 90, per Salter, J.; WESTLAKE 105 § 58a concludes convincingly that "the liability of a father to maintain his son is determined solely by the law of the father's domicile." But BEALE 1433 § 457.2 infers the primary importance of the place "where support is needed," meaning probably the domicile of the child.

Norway: Sup. Ct. (1918) 2 Z.ausl.PR. (1928) 873 no. 52.

³³ Switzerland: BG., Civ. Div. (March 24, 1927) 53 BGE. II 89, 92, following BG., Constitutional Division (May 15, 1925) 51 BGE. I 105; Bern 47 ZBJV. 663, no. 43; see SCHNITZER 213.

³⁴ France: NIBOYET, Notions Sommaires (1937) 192 no. 320. Former *obiter dictum* of the Swiss BG. (Oct. 2, 1913) 39 BGE. II 495, 499; BG. (Oct. 22, 1919) 45 BGE. II 503.

³⁵ National law of mother:

Germany: EG. art. 21.

Czechoslovakia: Draft of Code on International Private Law, § 36 (1), adopted by Sup. Ct. Brunn (Dec. 9, 1927) JW. 1928, 1476.

³⁶ National law of the child:

Brazil: Sup. Trib. (Aug. 29, 1900) 84 O Direito 547 (inheritance by will).

Finland: Law of 1929, § 21 *in fine* (claims other than for aliments against foreigners).

France: some decisions before the first world war following 5 LAURENT 515,

the national law of the man; ³⁸ of the man and of the child, cumulatively. ³⁹

3. Public Policy

(a) After having produced every possible opinion on the subject, the French doctrine now struggles to keep a balance between the personal (national) law of the child, which is applicable in theory, and the French law which is applied on many grounds. In the first place, French law prevails where French nationality depends on filiation, since it ought never

523ff. and other writers; again in increasing consistency: Cass. (req.) (June 8, 1921) Mihaesco, *Revue* 1924, 73; Cass. (civ.) (Jan. 20, 1925) Tomatis, S.1925.1.49, D.1925.1.177, *Clunet* 1925, 709, *Revue* 1925, 532; Cass. (civ.) (April 1, 1930) D.1930.1.89, *Clunet* 1930, 973, *Revue* 1930, 293; Cass. (req.) (March 5, 1935) Fernandez, D.1935.1.57, *Revue Crit.* 1935, 775, *Nouv. Revue* 1935, 58; Cass. (civ.) (July 20, 1936) *Revue Crit.* 1937, 694.

Similar for foreign children: Cass. (civ.) (June 21, 1935) *Gaz. Pal.* 1935. 2.348; App. Colmar (June 15, 1934) *Nouv. Revue* 1934, 809.

The Netherlands: Hof Amsterdam (May 2, 1913) W. 9557, *Clunet* 1920, 765 (child born in the Portuguese colony of Loanda, Dutch father, Portuguese law); Rb. Rotterdam (June 25, 1934) N. J. 1935, 960 ("constant practice"); Rb. Haarlem (Nov. 2, 1926) W. 11697 (termination of alimentary right). Cf. also 1 VAN HASSELT 78; VAN DER FLIER, *Grotius* 1937, 166; VAN DER FLIER, *Grotius* 1939, 190.

Código Bustamante art. 57 (cf. art. 59).

³⁷ National law of mother and child cumulatively:

Poland: Law of 1926, art. 21 (except where both father and mother are domiciled in Poland, art. 21 par. 2).

Writers, especially in Italy, see MORELLI, 9 *Annuario Dir. Comp.* (1934) III 142 no. 476.

³⁸ National law of defendant:

Austria OGH. (Feb. 8, 1938) 20 SZ. 64, no. 34. Cf. *ibid.* 265, no. 128; but see for public policy, *infra* n. 44.

France: Courts in former periods, see J. DONNEDIEU DE VABRES 381 n. 2, and still App. Poitiers (Jan. 29, 1929) *Clunet* 1929, 1046; SURVILLE 448 no. 306; NIBOYET 757 no. 645, 763 no. 649, and NIBOYET, Note S.1925.1.305.

Germany: for problems other than alimentary, see *supra* n. 18.

Greece: C. C. (1940) art. 20.

Italy: Cass. (Oct. 21, 1925) 17 *Rivista* (1926) 515; App. Milano (May 12, 1931) *Monitore* 1931, 612.

Siam: Act on Conflicts Laws, Sect. 36, cf. LEWALD, *Règles générales des conflits de lois* (1941) 36 n. 10.

³⁹ National law of father and child:

France: a few decisions after the war, see J. DONNEDIEU DE VABRES 494 n. 5.

Italy: Cass. (April 7, 1932) *Foro Ital. Rep.* 1932, *Filiazione* 686 nos. 38, 39; Cass. (July 10, 1936) 3 *Giur. Comp. DIP.* 145 no. 75.

to be based on a foreign law.⁴⁰ "The question of filiation is absorbed by the higher one of nationality."⁴¹ Only once, in a decision of the Court of Paris, does the private law question seem to have been duly isolated.⁴² Where a child is born in France, it is thought invested with a provisional French nationality and, for this reason, subject to French law; moreover, it cannot lose this provisional nationality except by French law or a foreign law similar to the French.⁴³

(b) In an analogous way the law of the forum prevails in some other countries, when one party⁴⁴ or the defendant⁴⁵ is a subject of the forum, or both parties⁴⁶ dwell within the forum. The Polish law declares Polish law applicable (instead of the common nationality of mother and child at the time of birth), if both father and mother are domiciled in Poland at the time of birth and Polish law is more favorable to the child.⁴⁷ German law refuses to impose upon a German defendant a duty of support beyond what the internal law grants.⁴⁸

⁴⁰ Cass. (civ.) (Nov. 30, 1920) D.1921.1.177, S.1921.1.241, Clunet 1923, 89; Cass. (civ.) (Feb. 25, and March 31, 1930) D.1930.1.113, S.1930.1.321. Cf. GAUDEMET, Rev. Trim. D. Civ. 1921, 218; see *supra* p. 138.

⁴¹ Trib. Nancy (Feb. 13, 1904) D.1904.2.249.

⁴² Cour Paris (Nov. 4, 1932); cf. Cass. (civ.) (July 21, 1933) Revue Crit. 1934, 405ff., criticized by LEREBOURS-PIGEONNIÈRE 414 n. 1.

⁴³ Cour Paris (July 2, 1926) D. H. 1926. 441, Clunet 1927, 77.

⁴⁴ Austria: OGH. (1938) 20 SZ. 265, no. 128 (dictum).

Denmark: Sup. Ct. (Højesteret) (June 22, 1915) 2 Zausl.PR. (1928) 865 and Western Court (Vestre Landsret) (Oct. 4, 1928) 7 Zausl.PR. (1933) 924 (mere residence of the father at the commencement of the action suffices for application of Danish law).

The Netherlands: often, although not consistently, see 1 VAN HASSELT 79 and Supplement 31ff.

⁴⁵ Switzerland: OG. Zürich (Oct. 13, 1936) Bl.f.Zürch. Rspr. 1938, 39, no. 21.

⁴⁶ Germany: LG. Hamburg (Oct. 13, 1932) IPRspr. 1932, no. 94; LG. Frankfurt (July 30, 1934) IPRspr. 1934, no. 7; RAAPE, 2 D.IPR. 210 (controversial).

⁴⁷ Poland: Law of 1926, art. 21 par. 2.

⁴⁸ Germany: EG. art. 21 last clause: "No greater claims, however, can be enforced than what have been constituted by German law." Understood as merely protecting Germans, RGR. Kom., n. 2 before § 1705; LG. Bartenstein (Nov. 18, 1929) IPRspr. 1930, no. 79. What is the equivalent of an award under the German law? See for illustration cases in IPRspr. 1930, nos. 80-83.

These exceptions to the personal law do not leave much space to the pretended principle. There are yet others.

(c) Where, as between foreign parties, their national law excludes suits involving the question of paternity, the action is dismissed as a rule by courts following the nationality principle. Thus, the Italian provision before 1939, that no actions lay on the ground of paternity except in the cases of abduction or rape, was observed in Germany,⁴⁹ France, *et cetera*. On the other hand, the action is also rejected where the national law allows but the municipal law of the forum refuses the claim. So long as the famous maxim of the *Code Napoléon* (article 340) was in full sway that "*la recherche de la paternité est interdite*," foreign children were unable to sue their foreign parents in France,⁵⁰ and the same prohibitive policy operated in Italy,⁵¹ the Netherlands,⁵² Guatemala,⁵³ *et cetera*.

The French courts have transferred this doctrine to their mitigated provision, as it has stood since 1912. No action is admitted, unless the precautions and conditions precedent provided in the present article 340 are fulfilled, i.e., unless paternity appears manifest by written evidence or recognition. In this opinion, foreign laws more liberal than the French offend the public order aiming at "the honor and peace of families."⁵⁴ Laws which render paternity actions still more difficult than the French have free play.⁵⁵

⁴⁹ LG. Stuttgart (Dec. 31, 1931) JW. 1932, 1415, IPRspr. 1932, no. 93, against RAAPE 521. Dutch parties: no action according to BW. arts. 338, 342 par. 1, 343 par. 1, 344, LG. Leipzig (Sept. 23, 1933) IPRspr. 1933, no. 49. But see below n. 63. The new Italian C. C. (1938) art. 267, C. C. (1942) art. 269, recognizes four grounds for action.

⁵⁰ *Contra*, 2 FIORE 272 no. 733, 279 no. 739, 283 no. 741.

⁵¹ FEDOZZI 496.

⁵² BW. art. 342 par. 1.

⁵³ MATOS 324ff. nos. 271, 272.

⁵⁴ Cass. (civ.) (Jan. 20, 1925) S.1925.1.49; and in most definite manner Cass. (civ.) Rohmann c. Kellerhals ès-qual (March 26, 1935) S.1936.1.89, D.1935.1.61, Nouv. Revue 1935, 58, Revue Crit. 1935, 768; Cass. (civ.) (Nov. 30, 1938) Gaz. Pal. 1939.1.203, Nouv. Revue 1938, 838.

⁵⁵ See the criticism of BATIFFOL, Revue Crit. 1934, 618; *ibid.* 1935, 617.

To illustrate special points, domestic provisions respecting the time limit within which the child's conception is presumed are often held to be imperative. The old Prussian practice did not follow this view; whether the European common law, determining the time as running from the 300th to the 182nd day, or the Prussian *Landrecht*, fixing it from the 285th to the 210th day should be applied, was determined according to the domicile of the mother.⁵⁶ But the courts of Austria⁵⁷ and France⁵⁸ refused to deviate from their own rules. Also, whether a defendant whose cohabitation is proved may raise the defense of several cohabitants is decided by contradictory rules, according to the personal law or the *lex fori*,⁵⁹ *et cetera*.

Reasonably, the Swiss Federal Tribunal has stated that the exception allowed the defendant cohabitant under article 315 of the Swiss Code, that the child's mother led a frivolous life, does not imperatively operate against a foreign national law, since such dissimilarities are to be borne under the principle of territorialism (meaning domicile) dominating the Swiss international private law.⁶⁰

Finally, the award of alimony often is either simply controlled by the law of the forum,⁶¹ or, even if the personal law

⁵⁶ Prussian Obertribunal, 54 Striethorst 47, no. 12.

⁵⁷ OGH. (March 4, 1937) 19 SZ. no. 70, applying Allg. BGB. § 163.

⁵⁸ France: after the time determined in C. C. art. 340, a suit is not taken in hand, even though the child acquired French nationality only after the end of it; Cass. (req.) (July 15, 1936) Revue Crit. 1937, 151; Cass. (civ.) (May 27, 1937) Revue Crit. 1938, 82. Cf. NIBOYET, Revue Crit. 1934, 135; BATIFFOL, Revue Crit. 1935, 622; *ibid.* 1938, 83; see also the criticism by COSTE-FLORET, 7 Giur. Comp. DIP. 129 no. 64.

⁵⁹ Personal Law: Also on this point the Prussian courts constantly applied the domiciliary law of the mother; see 1 REHBEIN 84, no. 23. Germany: personal law of the mother against foreign defendants, see LEWALD 144, 146ff.; RAAPE 513. *Lex fori*: Austria: OGH. (Feb. 19, 1924) 6 SZ. 152 no. 66, and WALKER 818 n. 59, declaring the rejection of *exceptio plurium concumbentium* (Allg. BGB. § 163) as imperative.

On the Dutch controversy, *supra* pp. 615-616.

⁶⁰ BG. (March 24, 1927) 53 BGE. II 89, 94.

⁶¹ The lower Dutch courts applied the personal law of a natural father or of the minor child to the question who had to sue for the child; but the Supreme Court, H. R. (June 13, 1924) W. 11295 declared the appointment of a special curator under art. 344h of the Dutch BW. indispensable.

is primarily applied, the usual amounts of support are considered as the maximum⁶² or, conversely, the minimum.⁶³ By the latter consideration, a foreign law granting little or no support is eliminated as inhuman or scandalous.

What persons may be liable to support the child,⁶⁴ or in what circumstances the right to institute the action is forfeited or lost by limitation,⁶⁵ has been held subject to the personal law.

4. Time Element

If the law of the place of birth or the mother's personal law at this date obtains, it is implied that a pregnant girl who, before confinement, changes her nationality by marriage or otherwise, or changes her domicile, respectively, will thereby affect the fate of the child she gives birth to afterwards, unless the child acquires a nationality of its own by *jus soli*. On the other hand, a change in the local connections of the person whose personal law at birth is decisive does not affect alimentary duties as once established or denied.⁶⁶ The Polish

⁶² France: Most decisions take it for granted that French law is applicable; Trib. Seine (June 18, 1934) Clunet 1935, 619. BATIFFOL, Revue Crit. 1937, 431 praises the prudence of Cass. (civ.) (July 20, 1936) Gaz.Pal.1936.2.696, 7 Giur. Comp. DIP. 135 no. 65, Revue Crit. 1937, 694 because the court specifies the characteristics of § 1708 of the German BGB. which make the section inapplicable in France.

Germany: RAAPE 521 contends that an award under foreign law which would ruin the defendant should not be given. *Contra* Italy: FEDOZZI 496.

⁶³ Germany: LG. Hamburg (Oct. 13, 1932) IPRspr. 1932, no. 94, LG. Frankfurt (July 30, 1934) JW. 1934, 2644, IPRspr. 1934, no. 7 (English mother and child); AG. Kehl (Sept. 22, 1935) 6 Giur. Comp. DIP. 298 no. 242 (Luxemburg); LG. Hamburg (Sept. 2, 1936) JW. 1936, 3492 (Old Rumania).

Contra: Belgium: Trib. civ. Bruxelles (March 11, 1933) Clunet 1933, 1041 (Belgian public order not interested). Germany: LG. Stuttgart (Dec. 31, 1931) JW. 1932, 3831.

⁶⁴ German LG. Bartenstein (Nov. 18, 1929) IPRspr. 1930, no. 79 (paternal grandfather liable under Swiss law).

⁶⁵ Swiss BG. (Oct. 22, 1919) 45 BGE. II 503, 505.

⁶⁶ Swiss BG. (March 24, 1927) 53 BGE. II 89.

Germany: RAAPE 514; same, 50 Recueil 1934 IV 405, 454ff.

Italy: Cass. (Dec. 2, 1933) Foro Ital.1934.1.683.

law generalizes this rule so as to include all relations between father and child.⁶⁷

French courts followed this rule until the first World War⁶⁸ and occasionally later up to 1920.⁶⁹ As, however, the cases became more frequent where a child changed its nationality between its birth and a judgment for alimentation, the highest Court developed a peculiar doctrine amounting to the following rules: A foreign child acquiring French nationality is subjected to French law.⁷⁰ A child of French nationality changing to foreign citizenship is also subject to French law on the ground of the theory of vested rights.⁷¹ This theory "turns so as only to protect the *lex fori*,"⁷² a purpose which seems disproportional to the fact that the French law is backward on this point and puts the child at a disadvantage.

No such questions arise in this country, as each court applies its own state statute.

5. Renvoi

In this particular field, the German statute has omitted to provide for renvoi. It has been applied nevertheless,⁷³ against some opposition.⁷⁴

⁶⁷ Poland: Law of 1926, art. 21.

⁶⁸ VALÉRY 1145 no. 807; BATIFFOL, 8 Répert. 410 no. 35; 3 ARMINJON 50 no. 47. Cf. J. DONNEDIEU DE VABRES 381.

⁶⁹ Cour Paris (Dec. 22, 1920) S.1921.2.97.

⁷⁰ Cass. (req.) (June 8, 1921) Mihaesco, Revue 1924, 73; Cour Paris (March 27, 1933) Contardo, Revue Crit. 1934, 135; Cass. (req.) (July 15, 1936) Contardo c. Chaffy, Revue Crit. 1937, 152; Cass. (civ.) (May 27, 1937) Roure c. Maumy, Revue Crit. 1938, 82.

⁷¹ Cass. (civ.) (June 28, 1932) Revue 1932, 685 at 688, Clunet 1933, 368; Cass. (civ.) (May 27, 1937) Revue Crit. 1938, 82.

⁷² J. DONNEDIEU DE VABRES 499.

⁷³ AG. Stuttgart (Oct. 22, 1930) JW. 1931, 157, IPRspr. 1931, no. 87 (American mother: the American courts, applying the law of the forum, are deemed to approve of the domiciliary court doing the same, following an opinion of the writer). Also the French App. Rennes (July 24, 1923) Clunet 1924, 410 seems to apply New York law because the father still was domiciled in New York.

⁷⁴ See RAAPE, 2 D.IPR. 209; ECKSTEIN, 6 Giur. Comp. DIP. 298 no. 242.

III. RECOGNITION OF A CHILD

In the French system, adopted in many countries, acknowledgment of a child by father or mother must precede any claim of rights on the ground of illegitimate relationship and moreover is a condition of legitimation. In another phase, recognition may improve the situation of an illegitimate child without reaching full legitimation (Greece, the Netherlands, Switzerland, and others) or only exclude the *exceptio plurimum concumbentium* (Germany). We are dealing therefore not with one but several distinguishable institutions of private law.

1. Formalities

Formalities, which greatly differ,⁷⁵ would be expected to suffice if complying with the place where the act of recognition occurs.⁷⁶ But the rule "*locus regit actum*" is challenged by the personal law. Dominant opinion in France, in particular, requires a formal "authentic" declaration such as is usual in France when a Frenchman recognizes a child abroad and lets the local regulation determine only what solemnity "authentic" documents ought to have.⁷⁷

In the Restatement, § 140, the law of the parent's domicile seems to extend to all questions including formalities. Probably, this is the actual law.⁷⁸

⁷⁵ For the United States see 4 VERNIER § 244.

⁷⁶ Swiss BG. (Dec. 19, 1940) Praxis 1941, no. 9 at 23ff.

⁷⁷ Trib. civ. Pau (May 13, 1888) Clunet 1893, 858. Less clear Cass. (req.) (Aug. 2, 1897) D.1898.1.377, S.1900.1.283, Clunet 1898, 127 (Frenchman recognizing his child in Singapore by a "testamentary letter," a kind of will unknown to and invalid under English local law).

Contra: LEREBOURS-PIGEONNIÈRE 413 no. 348.

Germany: RAAPE 520 advocates the local form, but at 522 the personal law respecting the question whether recognition can be made in a private will.

⁷⁸ Cf. Richmond v. Taylor (1913) 151 Wis. 633, 139 N. W. 435, and 2 BEALE 711, § 140.1.

2. Substantive Requirements

The personal law seems to be universally applied. It does not have to be the same law, however, that governs the alimentary obligation. Prevailingly, the domicile⁷⁹ or the nationality⁸⁰ of the recognizing parent is determinative, since the conditions of an act burdening its author and particularly his capacity should depend upon his law. Hence, even courts which subject the alimentary action to the law of the child or consider this law cumulatively proclaim the rule. Nevertheless, sometimes the law of the child,⁸¹ or the cumulated laws

⁷⁹ U. S. Restatement § 140; Pfeifer v. Wright (1930) 41 F. (2d) 464; *In re Forney* (1919) 43 Nev. 227, 184 Pac. 206, 186 Pac. 678; Eddie v. Eddie (1899) 8 N.D. 376, 79 N.W. 856; 2 BEALE 711 § 140.1. (the laws of mother and child are not to be consulted, because the act is beneficial for the status of the child).

Former Prussian law: Prussian Obertribunal (April 11, 1856) 32 Entsch. kgl. Ob. Trib. 401 no. 51 (recognition by a minor domiciled at a place under Prussian law executed in a territory of French-Rhenish law was invalid according to Prussian law. The court notes, at 406, as singular that the recognition would have been valid according to Rhenish law, and would have bound the minor as a confession of impregnation under Prussian law, if executed in a territory of the latter law; it regrets a hardship caused "by the conflict of heterogeneous legal systems." This adds an argument to the adoption of the *lex loci actus*. But, today a court would establish an extraterritorial confession, although the declaration was made abroad).

⁸⁰ Brazil (former law): Sup. Trib. Fed. (Feb. 8, 1896) Clunet 1896, 1080, 70 O Direito 13, Ap. Civ. no. 141.

France: dominant practice from 1892 on, see J. DONNEDIEU DE VABRES 495; Cass. (civ.) (Jan. 17, 1899) S. 1899.1.177, D. 1899.1.329; Cour Paris (April 30, 1935) Nouv. Revue 1935, 70; BATIFFOL, Revue Crit. 1935, 623 no. 14; and now confirmed by Cass. (civ.) (March 8, 1938) Fontaine c. Pulteney, Nouv. Revue 1938, 120, Revue Crit. 1938, 653. The Swiss Federal Trib. (BG.) (June 20, 1929) 55 BGE. I 147, 149 remarks that this theory is necessitated by the effect of the recognition on procuring the child French nationality.

Germany: RAAPE 523, III 3 (a).

Greece: App. Athens no. 445 (1896) Clunet 1897, 621.

Italy: Cass. (April 7, 1932) Foro Ital. Rep. 1932, 686 nos. 36 and 39; Cass. (July 10, 1936) 3 Giur. Comp. DIP. 145, no. 75.

Switzerland: BG. (Dec. 22, 1909) 35 BGE. I 668, 675; Just. Dep., BBl. 1939, II 283 no. 11 (a former Swiss national, naturalized in Canada, cannot adopt children in Switzerland complying with Swiss law only). Correspondingly, the BG. (Dec. 19, 1940) Praxis 1941, no. 9 at 23 has applied NAG. art. 28 to the recognition by a Swiss father domiciled in France, thus determining the effects by renvoi under Swiss law.

⁸¹ Código Bustamante art. 57.

of the parent and child,⁸² or the child's law limited to the capacity and consent of the child,⁸³ have been adopted or advocated. In the only American case that is known to be in point,⁸⁴ Italian law, being that of the child's domicile, was applied, and on this basis the court held it sufficient that the father, newly immigrated, had executed a power of attorney in Philadelphia and sent it to Italy, whereupon his agent recognized the child formally in Italy. The fact that the man had been domiciled in Italy, at least until a short time before, and for the time being perhaps was merely resident in this country, may have influenced the decision. But it would be reasonable to recognize the validity of a recognition sufficient by the child's law where, as in this case, the parent practically makes an appearance in the child's country. Still more can be said in favor of giving the child those remedies for opposing a recognition, or for contesting its validity, which the child's own law provides.⁸⁵

3. Scope

The personal law determines:

Who may recognize, e.g. after the parent's death;

Under what conditions;⁸⁶

Among French writers, recently, NIBOYET 769 no. 650; LEREBOURS-PIGEONNIÈRE 418 no. 350; BATIFFOL, *Revue Crit.* 1938, 655 (insists on this opinion even after the decision of the court of cassation of March 8, 1938).

⁸² United States: TAINTOR, "Legitimation, Legitimacy and Recognition in the Conflict of Laws," 18 *Can. Bar Rev.* (1940) 589 at 612.

France: Some decisions and writers, see WEISS, 4 *Traité* 46, 3 ARMINJON 47 no. 44ff., AUDINET, Note S.1920.2.65.

Belgium: POULLET 512 no. 392; *Novelles Belges*, 2 *D. Civ.* 619, no. 587.

Italy: ANZILOTTI, 2 *Rivista* (1907) 115; DIENA, 2 *Princ.* 181; CAVAGLIERI 244ff.

⁸³ Japan: Law of June 15, 1898, art. 18.

China: Law of Aug. 5, 1918, art. 13 (speaking of "recognition").

⁸⁴ *In re* Moretti's Estate (1932) 16 *D.&C.* (Pa.) 715, commented on by TAINTOR, 18 *Can. Bar Rev.* (1940), *supra* n. 82, at 612.

⁸⁵ Italy: Cass. (April 7, 1932) *Foro Ital. Rep.* (1932) 686 nos. 38 and 39.

The Netherlands: VAN HASSELT, 6 *Répert.* 634 no. 195.

⁸⁶ The Netherlands: Hof Amsterdam (Jan. 27, 1913) W.9438 and (May 2, 1913) W. 9557 (paternal recognition under foreign law during the lifetime of

Whether before the child's birth, and whether after its birth;

Whether the child must have reached a certain age;

Whether the child's consent is required;

Whether adulterine children can be recognized and under what conditions;⁸⁷

Under what conditions and by whom a recognition may be contested;⁸⁸

And, as submitted earlier, all effects of recognition.⁸⁹

The effect of acknowledgment or recognition on the problems of succession upon death, in any consistent rule, should be determined by the same rule as that governing the formation of the act,⁹⁰ unless the inheritance statute either rejects children born out of wedlock or admits illegitimate children

the mother without her consent recognized, although prohibited by BW. art. 339).

⁸⁷ Bruxelles (July 15, 1904) 17 Pand. Pér. (Belg.) 1904, no. 859, *Novelles Belges*, 2 D. Civ. 619 no. 586 (recognition abroad under foreign laws valid); public order is advanced by AUDINET, *Revue* 1917, 516 at 527; POULLET 509 no. 390.

⁸⁸ France: Trib. Seine (Dec. 24, 1926) *Clunet* 1928, 710 (Russian recognizing Italian child, Soviet Russian law); App. Colmar (Nov. 28, 1930) *Clunet* 1932, 470 (German law; on the person entitled to contest); Cass. (civ.) (Jan. 17, 1899) S.1899.1.177, 8 D.H.1899.1.329, *Clunet* 1899, 546, and Cass. (req.) (Jan. 9, 1906) *Revue* 1907, 154 (case of Bourbon de Bari, Italian law), much criticized by the critics, ANZILOTTI, 3 *Rivista* (1908) 171, Note, and WEISS 4 *Traité* 73, 75, PILLET, Note, S.1899.1.177 and BARTIN, Note, D.H.1899.1.334, among others, were of different opinions).

Germany: LG. Frankfurt a. M. (Aug. 17, 1932) JW. 1933, 191, IPRspr. 1933, no. 48 (in application of EG. art. 21, sentences 1 and 2 hold that the recognition cannot be annulled but recovered as undue enrichment).

⁸⁹ The Netherlands: Arbitration Court for maritime accident insurance (Feb. 26, 1938) 42 Bull. Inst. Int. (1940) 69 no. 10992 (recognition under German BGB. § 1718 does not constitute a relationship of the character required for a right for damages by law on maritime accidents).

France: in the case of Cass. (civ.) (March 11, 1936) *Revue Crit.* 1936, 714 with Note by NIBOYET (?), 7 *Giur. Comp. DIP.* 131 no. 66 with Note by COSTE-FLORET, recognition made in Saïgon, Indo-China, by an English father was considered invalid on the ground of English law, but treated as a confirmation of the natural obligation imposed on the illegitimate father in French conception. The court applied French law without considering the conflicts problems involved which are new and doubtful.

⁹⁰ See *supra* p. 592 and *infra* pp. 654-658.

irrespective of recognition⁹¹ or irrespective of a recognition other than as specified by the statute itself.⁹²

IV. MOTHER AND FATHER

Modern statutes determine expressly the law under which an illegitimate mother may sue the procreator or cohabitant for the costs of pregnancy, delivery, and support. Again, they may variously refer to the laws of the mother,⁹³ the mother and child,⁹⁴ or the defendant.⁹⁵ Courts without express statutory provisions will incline to the law of the forum.⁹⁶

A problem of classification ought to be reported in this connection. French practice gives the mother an action against the father, ostensibly on the ground of a tort consisting in the illegitimate intercourse, but actually as a substitute for the remedies of support missing in the written law. The courts award the woman, together with her own damages, alimony on behalf of the child. Under which conflicts rule should such a claim be subordinated in a non-French jurisdiction whose municipal law establishes for the analogous purpose specific family obligations? A reasonable answer should eliminate all technical legal constructions and envisage the social purpose of the claim. The adequate conflicts rule to deal with these institutions is evidently bound to be independent from tort

⁹¹ United States: *Moen v. Moen* (1902) 16 S. D. 210, 92 N. W. 13 (since under the South Dakota law every illegitimate child inherits, it is entirely immaterial what right Norwegian law attached to the recognition).

⁹² *Van Horn v. Van Horn* (1899) 107 Iowa 247, 77 N. W. 846 (a notorious recognition suffices under the Iowa inheritance law, irrespective of the significance given the recognition in New Jersey).

⁹³ Germany: EG. art. 21.

Greece: C. C. (1940) art. 21; MARIDAKIS, *Revue Crit.* 1938, 347 indicates as motive of the draft, that the mother needed protection.

⁹⁴ Poland: Law of 1926, art. 21.

⁹⁵ Japan: Law of June 15, 1898, art. 21.

China: Law of Aug. 5, 1918, art. 16.

⁹⁶ E.g., the Netherlands: Law of the mother: Amsterdam (Dec. 13, 1929) W. 12193 Rb. Groningen (May 21, 1932) W. 1932, 12479 (law of the place of cohabitation—in the Netherlands). Rb. den Haag (Nov. 29, 1934) W. 1936, no. 652. For former views see KOSTERS 542.

considerations as well as from a narrow meaning of "family" law, going directly to the question of what an illegitimate mother is entitled to demand from her cohabitant.⁹⁷ It follows that, if the cohabitation took place in France, French and German courts should apply to a French mother the French remedy, and if the facts occurred in Germany, the German family law.⁹⁸

The French courts, however, oppose to the German law their "*ordre public*."⁹⁹

V. CONCLUSIONS

The state of chaos reported in this part could easily be reduced by a simpler, if not uniform, approach. The legitimate family ought not to be denied a unified legal regulation; it was an entirely sound idea that the law of its head should govern all relations of the family. The two main objections to this axiom raised in the last decades are unconvincing. One of these objections is associated with the nationality principle in Continental Europe. In view of the modern trend toward granting separate nationalities to married women and children, the conclusion is popular that the national law of the father must yield its dominant role; that it must either concur with the children's laws or even give way to them completely. This may be logical, but it amounts to a new inroad upon the nationality principle itself. This principle, then, is no longer, if it ever was, suitable as the main vehicle of conflicts law. It will be abolished some day. So long as it is maintained, however, the objection should be disregarded. The only practical method consists in determining the events affecting the life of the family according to the national law of

⁹⁷ To this extent the theory of the writer, 5 Z.ausl.PR. (1931) 265 has been approximately allowed by NEUNER, Der Sinn 110 and RAAPE, 50 Recueil 1934 IV 528 to 533.

⁹⁸ NEUNER and RAAPE (precedent note) seem to draw more radical conclusions.

⁹⁹ App. Douai (March 1, 1939) Bull. Inst. Int. 1940, 81 no. 11032.

the father and, after his death, that of the mother. The other reason for opposing the rule of the parent's law has been derived from the need of the child to be protected. We have tried to show that the benefit of the child ought to be protected by all legislatures and all courts rather than exclusively by the law and the jurisdiction to which the child belongs, often only accidentally. Conflicts law must presuppose equality among the particular national laws, statutes, and tribunals.

Consequently, it is natural that in the countries devoted to the principle of domicile the law of the domicile of the family head at the birth of the child determines the latter's legitimacy; furthermore, his law at the time of a legitimation or adoption governs the conditions and effects of such acts, as at later dates it indicates the rights and duties following from legitimate father-child relations. The inheritance law of a domicile acquired after legitimate birth, legitimation, or adoption ought not to change any of their effects, unless there is a distinct, exceptional public policy, either prohibitive or permissive, at the forum of inheritance.

The only question less definitely answerable by theoretical and practical considerations is concerned with the American peculiarity of ascribing different positions to a child with respect to his father and his mother. The ideas and consequences of this peculiarity have not been fully explained, to the knowledge of the writer.

Entirely different is the nature of the problems arising from illegitimate filiation; French and other conflicts laws should not have formed a category of "filiation" comprehending all children. Of course, any act of acknowledgment or recognition by a parent is governed simply by the law of this parent. Moreover, something can be said for the personal law of the mother with respect to her relationship to the child. But the relations to the procreator which are derived from conception,

birth, or cohabitation cannot be referred, without artifices, to the place where any one of the three persons involved was domiciled, or was a national, and still less to the contacts at the time of the action. As it is very important for the purpose of a serviceable conflicts rule not to base it on any special domestic construction of the liabilities or the rights of the parties, the simplest contact, viz., with the place of the birth, is the most commendable. The danger that, before giving birth, the mother may move to a locality where the law is unfavorable to her or the child, is negligible; an improvement for the child is welcome.

These suggestions are not meant, however, to supersede the system under which bastardy proceedings are now authorized in this country. Support is awarded under similar considerations throughout the country, and interstate relations are the only ones to be considered. Hence, the chief concern is with jurisdiction, which naturally is found at the father's domicil as well as where personal jurisdiction over him is obtained at the mother's domicil. Every court applies its own law.

Lex fori, as a matter of fact, can be defended in this doctrine with comparatively better justification than anywhere else. In international matters, however, it should be avoided.

CHAPTER 17

Adoption

I. PRELIMINARY OBSERVATIONS

1. Definition of Adoption

IN some archaic civilizations, including the Greek, Roman, and Japanese, adoption has been the means of continuing a house and ancestor cult threatened with extinction. Hence, the original type of this institution implies that the adoptive son be considered exactly in the position of a veritable legitimate male issue (Greek: *υἱὸς θετός*, made son). In much later periods, adoption was used with the primary object of securing the welfare of a child. In this application, the class of persons capable of participating in the transaction was considerably enlarged (e.g., to include female adopters), and new varieties of adoption were introduced, with restricted effects, particularly in that the rights to be acquired by the adopter would be limited to care and education.

As a result, the national legislations present a much varied picture. In a number of countries, such as Scotland, the Netherlands, Portugal, Argentina, Chile, and Paraguay, adoption has never been introduced. The recent Civil Code of Guatemala abolished the formerly existing institution of adoption, because it had led to misuse by despoiling the assets and exploiting the labor of minors.¹ In most of the world, however, adoption in one form or another has been recognized by statute. The common law countries, including England, finally have followed this trend. However, many legislators have thought that they had to surround the institution with

¹ MATOS 394 no. 277.

formidable obstacles, while a strong modern current favors adoption as the best means of caring for destitute children. New adoption laws in France² and many other countries,³ which facilitate adoption through careful investigations by advisory offices, evidence this tendency.

The variety of policy considerations behind the national legislations is amazing. The Roman requirements implied by the saying, "*adoptio imitatur naturam*," have suggested many rules regarding age and family conditions of the parties, but these rules often also have been rejected, as for instance in the *Code Napoléon* which prohibited any adoption of minors in order to protect infants against exploitation. This rule, recently repealed in France and Belgium, still exists in other countries. On the other hand, only infants may be adopted in England, Sweden, and some of the United States. South-west Africa requires that the sixteenth year be not completed. Other fundamental differences characterize the effects of "adoption." In this country, some statutes declare that the adopted person is to be considered a legitimate child to all legal intents and purposes, but others follow the French method of enumerating the specific rights and duties affected. Although the latter method is generally accompanied by broad construction of the statutory texts,⁴ the results are not necessarily in favor of a standard of full legitimacy. Contrary to general custom, by some laws the natural father retains parental power, and by American and some foreign statutes adoption does not preclude marriage with the adopter. The child's name is subject to many variations. The statutes also exhibit the greatest diversity with respect to the rights of in-

² France: Law of June 19, 1923.

³ Belgium: Law of March 22, 1940.

Chile: Laws No. 5,343 of 1934, and No. 7,613 of 1943.

Italy: C. C. (1942) arts. 291ff.; etc.

⁴ 4 VERNIER 406, §§ 261ff.

terstate inheritance from and by the adopted parent, the child, and the natural family.

An important difference consists in the fact that in many laws the private contract effecting an adoption is construed as the very core of the transaction, the state acting only to authorize the agreement, while in other statutes the official decree ordering adoption on a party's application constitutes the essence of the act. In the latter case, the decree may be granted either as an act of discretionary power or as corresponding to a right of the parties who have complied with the legal conditions of adoption. Validity and revocability of the transaction depend largely upon these premises.

Finally, the state agencies intervening differ, and official action either precedes or follows the private agreement.

Thus, adoption forms an exemplar of the difficulties that may present themselves in formulating a uniform definition. As a matter of fact, the description of adoption given in the Restatement as a "relation of the parent and child created by law between persons who are not in fact parent and child,"⁵ is certainly too narrow, since in a number of legislations parents may adopt their natural children. If taken literally, this definition seems also to exclude all those institutions bearing the name of adoption that do not grant as respects both parties the full status of parent and child. Is this the real meaning, and, if so, is it right?

A clear answer to these questions would facilitate the discussion of certain problems concerning succession upon death by and from foreign adopted children. In the midst of this confused discussion, a well elaborated American decision ventured to proclaim that "A person is either adopted or not; a woman is either married or not. . . . there is no such thing as a limited status of adoption."⁶ This is manifest error and

⁵ Restatement § 142 comment a.

⁶ *In re Riemann's Estate* (1927) 124 Kan. 539 at 542, 545, 262 Pac. 16-18, confirming the view held in *Bilderback v. Clark* (1920) 106 Kan. 737 at 742, 189 Pac. 977, 980.

a very prejudicial one. A woman is indeed either married or unmarried, and, likewise, a child is legitimate or illegitimate, but there are adopted children of totally different kinds. It is of primary importance that each type should be understood and recognized according to its merits.

No wonder that it is hard to know what is meant by adoption in every one of the national *conflicts* rules. At any rate, the concept of adoption held in the municipal law of the forum is of no direct avail. Instead, a sound construction of the existing rules depends to some extent upon their own character. Where a conflicts rule emerges from the patriarchal thinking still characteristic of most family laws and therefore simply refers to the law of the adopter, especially the father, it is logical to assume that this rule is to be applied only to transactions creating a rather complete parent-child relation and not to an act exclusively conferring a right of inheritance upon the child. Again, if a conflicts rule calls for the law of the child only, this rule may embrace those kinds of adoption that contemplate only quasi-familial care and education. Quite reasonably, a German draft of 1929 provided for the application of the national law of the child to govern foster parenthood,⁷ though the primary German rule determines adoption according to the national law of the parent. Thus, the scope of conflicts rules dealing with "adoption" may vary. One limit, however, exists; no institution can be designated as adoption, unless it makes the child legitimate in relation to the adopting parent. An "adoption by the Nation" of French war orphans is, of course, not recorded in a Swiss register of civil status.⁸

2. Jurisdiction and Choice of Law

American writers and the Restatement speak of the "law governing adoption as a status";⁹ they probably mean the

⁷ See RAAPE 601 VIII no. 4.

⁸ Swiss BBL. 1924 II, 29 no. 15.

⁹ Restatement § 142 (within "status," not "jurisdiction"). Similar MINOR

law of the forum at the domicil of a party. However, in his treatise, Beale exclusively discusses jurisdiction for adoption. American and English courts, in fact, appear not to be concerned with choice of law problems but only with the question what courts have the power to create adoptions with extra-territorial effect. If so, common law is again in opposition to civil law, which sharply distinguishes between jurisdictional and conflicts rules and in principle applies foreign statutes.

In the civil law countries, jurisdiction for adoption does not offer much of a problem, since for this purpose foreigners usually enjoy the "hospitality" of the courts. It is true that access of foreigners to the courts for the purpose of adoption was questioned in France,¹⁰ but it now seems assured everywhere. A number of countries, however, refrain from taking jurisdiction, if the homeland does not approve of it.

The main question in these countries is concerned with choice of law, that is, primarily with selecting the law applicable to adoption of or by foreigners in the forum, but regularly the same conflicts rule suffices to determine recognition of foreign adoptions.

The difference of method between reference to a foreign personal law and simple application of the law of the forum seems fundamental. It is tempting to think that the personal law is more obviously to be complied with when the whole act is thought to be chiefly founded upon the contract of the parties. On the other hand, if the act of a governmental agency or court is the essentially constitutive part within the structure of adoption, the personal law of the parties may be neglected. However, distinctions are not so neat in actual practice. In this country, the personal law is never considered, although the civil law view emphasizing the significance of the private contract of adoption has left deep traces in many statutes.

221, 222 § 101; STUMBERG 307; Note, "Descent of Foreign Lands to Child Legitimated by Adoption," 36 Harv. L. Rev. (1922) 85.

¹⁰ The controversy on which see WEISS, 2 *Traité* 234 was ended by the Law of June 19, 1923, amending C. C. art. 345 par. 1.

II. ADOPTION OF OR BY FOREIGNERS WITHIN THE FORUM

1. Law of the Forum

(a) *United States*. Although the cases are known to be rather scarce and confused and certainly are contradictory, a prevailing opinion seems to be forming to the effect that two different grounds for assuming jurisdiction are open to election.

In the first place, it is agreed that a child can be adopted in the state of its domicil, irrespective of the domicil and residence of the adopting parents.¹¹ In the second place, there is increasing authority for concurrent jurisdiction of the state where the adopting parents are domiciled. The Restatement does not approve of this view, except when this state has jurisdiction over the person having legal custody of the child or when the child is a waif and subject to the jurisdiction of the state.¹² But the consent of the natural parents or the guardian, wherever they may live, should suffice.¹³ The few cases which may be looked to as authority seem to justify the unconditional jurisdiction of the adopter's domicil.¹⁴

The domicil of the child as a basis of jurisdiction¹⁵ has, however, been questioned. Sometimes, a mere domicil by operation of law, locating the child with its natural father or guardian, has been held insufficient without actual residence at the same place.¹⁶ Moreover, actual residence, particularly if habitual, has been preferred to a merely formal domicil, since the state where the child is dwelling is believed to have more ability to control the person of the child and to be more interested in its welfare.¹⁷ In reality, neither domicil nor

¹¹ GOODRICH 383 § 142 n. 50, 51, Restatement § 142 (a).

¹² Restatement § 142 (b); cf. 2 BEALE 713 § 142.2.

¹³ LORENZEN, 6 Répert. 349 no. 341.

¹⁴ GOODRICH 383 § 142 n. 53.

¹⁵ Strictly required by 2 BEALE 713 § 142.2 and Restatement § 142.

¹⁶ Blanchard v. State *ex rel.* Wallace (1925) 30 N. Mex. 459, 238 Pac. 1004.

¹⁷ See esp. STUMBERG 308ff., who invokes Stearns v. Allen (1903) 183 Mass. 404, 407, 67 N. E. 349 (child in Massachusetts with technical domicil in Scot-

residence, especially in large cities, guarantees that a court will be able to exercise effective supervision. On the other hand, every court, not excluding that of the adopter, will ordinarily be eager to safeguard the well-being of the child.¹⁸ The modern means of communication and the social relief agencies facilitate obtaining information. The interest of the child's consanguineous family will be better cared for by the court of the formal domicile of the child.¹⁹

These principles determine equally the granting of an adoption and the recognition of a foreign adoption.

(b) *British Law*. Under the British Adoption of Children Act, 1926,²⁰ an adoption order is not granted, unless the applicant is domiciled and resident in England and the infant is a British subject and resident in England. No provision is made regarding adoptions by British subjects domiciled abroad nor for children of foreign nationality, except that they are excluded from adoption proceedings in England. It is difficult to believe that no foreign adoption would be recognized with respect to British subjects, as has been suggested.²¹ The implication seems rather to be "that the domicile of the adopter at the time of the adoption is alone material."²² But certainly hardships are caused by the tenacious reluctance of English courts to acknowledge that the adopter has transferred his domicile from England to a foreign country.²³

land); *Rizo v. Burrue* (1921) 23 Ariz. 137, 202 Pac. 234; *Taylor v. Collins* (1927) 172 Ark. 541, 289 S. W. 466.

¹⁸ See GOODRICH 383 § 142 n. 54.

¹⁹ Cf. the propositions as to choice of law in England by MANN, "Legitimation and Adoption in Private International Law," 57 Law Q. Rev. (1941) 112, 123 n. 44.

²⁰ 16 & 17 Geo. V, c. 29 (1926).

²¹ DICEY 535 n. u; 2 BEALE § 143.1.

²² FALCONBRIDGE, "Conflict of Laws—Legitimation by Adoption or Recognition," 19 Can. Bar Rev. (1941) 37, at 39.

²³ KEITH, "Some Problems in the Conflict of Laws," 16 Bell Yard (1935) 4, 6 (a Scotchman resident but not considered "domiciled" in England cannot adopt the daughter of his deceased brother, even though the brother was domiciled in England and the daughter is resident there).

In Canada similar restrictions obtain. Indeed, a Canadian court has held that the adoption of a child domiciled with its natural parents in Alberta and adopted by order of an Alberta court, while the adoptive parents were domiciled in Saskatchewan, was invalid in the latter province.²⁴ Must all parties be domiciled in the same province? Falconbridge sees a solution of this strange conflict only in uniform and reciprocal legislation by the provinces grounded on the principle of the child's domicil.²⁵ But we may infer that the system of exclusive application of the law of the forum tends to absurd results, notably in the case where the different jurisdictions of the parties do not recognize each other's decrees. In Quebec, jurisdiction is granted, if one party is domiciled there.²⁶

(c) *Scandinavian Countries*. The domicil of the adopter determines the state where adoption must be sought under the Scandinavian Convention on Family Law (art. 11), which also decides expressly that the law of the forum is applicable (art. 12). With respect to adoptions in other foreign countries, the law of the forum governs under the Danish adoption law of 1923, with certain exceptions for Danes adopting abroad and foreign children adopted in Denmark.²⁷ More consideration is given to foreign law by the conflicts rules of Norway²⁸ and Sweden.²⁹

(d) *Law of the forum governing formalities everywhere*. It is in the nature of a state act, necessary in all countries to some extent to effect adoption, that all formalities required by the municipal law of the court (or other acting agency) must be observed. Also, recognition in another country de-

²⁴ *Culver v. Culver and Gammie* [1933] 2 D. L. R. 538, with reference to Haultain, C. J. S., in *Burnfiel v. Burnfiel* (Sask.) [1926] 2 D. L. R. 129.

²⁵ 3 *Giur. Comp. DIP.* no. 85 p. 171.

²⁶ Quebec: Adoption Act, R. S. Q. 1941, c. 324, s. 5; cf. 1 JOHNSON 349.

²⁷ BORUM and MEYER, 6 *Répert.* 221 no. 54.

²⁸ Law of April 2, 1917 as amended by laws of September 23, 1921, and May 24, 1935, §§ 29, 30.

²⁹ Law of June 14, 1917 with amendments, §§ 26, 27.

pendes on compliance with the formalities prescribed by the law under which the act is alleged to have been performed.³⁰

Illustration: An oral adoption agreement, completely performed by the adopted person and concluded within the state,³¹ will be given effect as creating a status by a Missouri court of equity, but is regarded as ineffective by a Missouri court, if concluded in Rhode Island and invalid according to the laws of such state.³²

Courts are naturally inclined to apply this principle with enhanced rigor when it comes to determining their own judicial procedure. Under the duty of applying foreign personal law, conflicts arise. Thus, German courts, in the case of a Soviet Russian adopter, refuse to confirm the contract because under the Soviet law adoption is created by mere state act.³³ In applying a foreign law requiring that the court examine the social advantages enuring to the child by the adoption, German courts even took it for granted that they were unable to intervene, because under the German Civil Code the courts (other than the court of custody) had only to inquire into the fulfillment of certain legal conditions. They refused, therefore, to authorize adoptions by French, Rumanian, and all other adopters whose personal law requires a substantive investigation of the child's benefit by the court.³⁴ If, however, a foreign personal law is to be applied at all, as prescribed by the German conflicts law, and jurisdiction is not doubtful, the

³⁰ It is sometimes asserted that the parties may constitute an adoption in any country according to their personal law, since the maxim *locus regit actum* is only of optional application. But there is no proof of actual force of this assumption which overlooks the significance of the administrative act.

³¹ *Buck v. Meyer* (1916) 195 Mo. App. 287, 190 S. W. 997.

³² *Mutual Life of New York v. Benson* (1940) 34 F. Supp. 859.

³³ KG. (April 7, 1933) IPRspr. 1934, no. 67; Bay. ObLG. (Oct. 31, 1934) JW. 1935, 1190.

³⁴ KG. (June 30, 1922) 42 ROLG. 188; KG. (Jan. 15, 1932) 6 Z.ausl.PR. (1932) 311, IPRspr. 1932, no. 98; KG. (March 10, 1933) IPRspr. 1933, no. 53, and still after a fundamental change of the adoption law by a law of November 23, 1933, see decision KG. (Sept. 6, 1935) 13 Jahrb. FG. 175. This practice was abandoned however by KG. (Nov. 8, 1935) JW. 1936, 53.

procedure should be adjusted so as not to frustrate the purpose of the institution.³⁵ This cooperative attitude has been recommended in France.³⁶ Remarkably, the Finnish statute directly provides that formalities essential under the national law of both parties should be observed so far as possible.³⁷

2. Systems of Personal Law

(a) *Law of the adopter.* Still starting from the postulate that one sole law should govern a family, many conflicts rules determine the substantive requisites of adoption exclusively according to the personal law of the adopter.³⁸ As, according to the municipal laws, a married person generally needs some joint action or consent of the other spouse for adopting a child, the situation where the spouses have different personal laws raises difficulties. The principle of personal law is best applied to this case, each spouse being distinctively subjected to his or her own law.³⁹

In this system, the child's interests are protected just as well or badly as the personal law of the adopter provides. In the prevailing construction of the German statutory rules, for instance, the personal law of the adopted person is not con-

³⁵ See RAAPE 597; RABEL, 6 Z.ausl.PR. (1932) 310.

³⁶ NIBOYET 776 no. 662.

³⁷ Finnish Law of Dec. 5, 1929, § 25.

³⁸ Germany: EG. art. 22 par. 1 (the father).

Poland: Law of 1926, art. 23 (the adopter); cf. SULKOWSKI, "Conception du droit international privé d'après la doctrine et la pratique en Pologne," 41 Recueil 1932 III 696ff.

Italy: C. C. (1938) Disp. Prel. art. 10 par. 2 and C. C. (1942) Disp. Prel. art. 20 par. 2, adding to the text of the final draft—"national law of the adopter"—the words: "at the time of the adoption."

Belgium: Trib. civ. Bruxelles (Dec. 21, 1926) Clunet 1928, 479 (a minor child of Belgian nationality adopted in France, where the prohibition in C. C. art. 346 of adoption of minors was abolished by a law of 1923 while it continued in Belgium).

France: App. d'Aix (March 16, 1909) Revue 1909, 642; SURVILLE 464 no. 316; 3 ARMINJON 55 nos. 53, 54.

Brazil (former law): Sup. Trib. Fed. (Jan. 16, 1940) 56 Arch. Jud. 421 (adoption made in Brazil; Italian law applied to capacity and consent of adoptive parent and natural mother of Italian nationality).

³⁹ See RAAPE 580, but also 589 (par. 4).

sidered, unless he be a German,⁴⁰ but it follows only that the provisions of the internal law of the forum, requiring the consent of the child or otherwise protecting it, are applicable.

Illustrations: (i) Where a German adopts a Danish child, the contract of adoption can be made, according to § 1750, par. 1 of the German Civil Code, by the child's guardian with authorization of the court. As the Danish principle of domicile refers to the local German law, the German court has jurisdiction. (KG. (June 7, 1929) IPRspr. 1929, no. 88.)

(ii) Adoption of a Swedish illegitimate child by a German depends on the consent of the illegitimate mother, according to § 1747 of the German Civil Code, but not subject to authorization of the Swedish king as required by Swedish law. (RG. (July 11, 1929) 125 RGZ. 265, IPRspr. 1929, no. 89.)

(b) *Consideration of the child's law.* In opposition to exclusive control of the law of the adopter, it has been postulated that the law of the child should govern those requirements which may be established for the protection of the child's status against hasty or dangerous alterations.⁴¹ This category was understood to include those provisions that require a certain age⁴² or full age⁴³ of the adopted person, or his consent or that of the persons and authorities charged with his personal care.⁴⁴ To the law of the adoptive parent are left the requirements concerning the adopter's age, any requisite difference in age between the parties, the absence of legitimate issue, or other interests of the family into which the adopted person is

⁴⁰ See the decision following in the text; and KG. (June 30, 1922) 42 ROLG. 188, 189; KG. (Oct. 29, 1926) IPRspr. 1926-1927, no. 81; LG. Dresden (Dec. 20, 1929) and OLG. Dresden (Feb. 18, 1930) IPRspr. 1931, nos. 90, 91. *Contra*: most writers, see RAAPE 550, 4 FRANKENSTEIN 174.

⁴¹ This theory was prominently developed by BAR 547 § 199 and NIBOYET 775, 776 no. 659. In different manner: BATIFFOL, 1 Répert. 252 nos. 3, 5; 4 FRANKENSTEIN 171.

⁴² WEISS, 4 Traité 113.

⁴³ When minors could not be adopted in France, before the Law of June 19, 1923, adoption abroad was considered void; see Trib. Valenciennes (*infra* n. 47).

⁴⁴ ROLIN, 2 Principes 167, 168 nos. 634, 635; PILLET, 1 Traité Pratique 651, 652 no. 319; Greece: C. C. (1940) art. 23 par. 1; Germany: EG. art. 22 par. 2 (as to German children).

to enter. For instance, adoption of natural children by their parents was forbidden by the Italian Civil Code of 1865 (art. 205) but permitted by French practice.⁴⁵ As this matter concerns the adopter's family, under this principle, an Italian could not adopt his own illegitimate child in France. A Frenchman would be permitted adoption of his natural child in Italy, if it were not considered contrary to public policy.⁴⁶

(c) *Exclusive application of the child's personal law.* In some recent opinions, the law of the child governs exclusively all conditions of adoption.⁴⁷ This thesis is based on the unwarranted identification of the child's law with the law best securing its welfare.

(d) *Both laws cumulatively applied.* Finally, in one of those well-known attempts to cumulate the laws where a choice between them seems hard, adoption is said to depend on all the requirements stipulated in each law of both the parties.⁴⁸ Such a mechanical addition results in not applying any one of the statutes and in impeding a transaction that all students of juvenile welfare wish greatly to foster.

Consideration of the law of a foreign party is accomplished

⁴⁵ Cass. (May 13, 1868) D.1868.1.249.

⁴⁶ 2 FIORE 310ff. no. 761; SURVILLE 464ff. no. 316.

⁴⁷ France: Trib. civ. Valenciennes (June 18, 1914) Clunet 1919, 242 (a minor girl of French nationality adopted by German parents; the decision may have rested also upon French public policy); Cour Paris (Jan. 14, 1926) Clunet 1927, 641. Writers limit themselves generally to the application of French law to French children.

Italy: App. Milano (May 9, 1910) Clunet 1913, 243.

Egypt: Trib. Alexandria (1926 no. 184) Clunet 1928, 1112 (American woman adopting a Greek child; Novella 17 of Emperor Leo applied).

Soviet Russia: Law of January 4, 1928, art. 6 (see MAKAROV 421): where adopting and adopted parties belong to different Soviet Republics, the consul shall apply the law of the child, if known, otherwise the law of the adopter, or, last, what law the adopter demands.

⁴⁸ Austrian OGH. (April 15, 1930) Zentralblatt 1931, 130 no. 33, Clunet 1932, 198. Probably of this type Japan, Law of 1898, art. 19; China, Law of Aug. 5, 1918, art. 14; Treaty of Montevideo on international civil law, text of 1940, art. 23 (difficult to understand). Advocated by BROCHER 333, DESPAGNET 848, 849 no. 284; BARTIN in 9 Aubry et Rau § 555 at 176, and n. 2; BARTIN, 2 Principes § 276 at 166; DIENA, 2 Princ. 186; CAVAGLIERI 247; 2 ZITELMANN 883; 4 FRANKENSTEIN 171 n. 4; LEWALD 153; *contra*: RAAPE 549.

in a much sounder way in those statutes that prohibit authorization of adoptions, unless these are recognized as valid by the laws of both parties.⁴⁹ That is, this rule has a proper place, provided that recognition is granted in the foreign country in a broad-minded spirit without insisting on the fulfillment of peculiar domestic requirements.

In the Finnish enactment, it is added that the adoptive relationship, if the adopter is a foreigner, cannot be rescinded in Finland, except if the adopter is there domiciled and the rescission is recognized in his national country.⁵⁰

(e) *Special rules on the effect of adoption.* In those jurisdictions where the personal law of the adoptive father governs the act creating adoption, the same law of the adoptive parent may govern the effect of adoption⁵¹ at any later moment, in the same way as a parent's law governs creation and effect of a legitimate parent-child relation. This means that, in the case of a change of personal law, later events are governed by the personal law of the time being. Where, however, the law of the child is influential in the constitution of the family relationship, this law is not appropriate to regulate the ensuing relationship within the adoptive family.⁵² Therefore, the statutes involved have mostly restricted the child's law to the creation of adoption and applied the parent's law to its effects.⁵³ In another, not more attractive, opinion advocated by Italian and

⁴⁹ Finland: Law of Dec. 5, 1929, § 24 par. 2.

Norway: Law of April 2, 1917 with amendments of September 23, 1921, and May 24, 1935, § 29 par. 1.

Sweden: Law of June 14, 1917 with amendments, § 26 par. 1.

Switzerland: Just. Dept. June 30, 1928, 25 SJZ. 80.

⁵⁰ Finland: Law of 1929, § 24 par. 2.

⁵¹ See for example, Germany: EG. arts. 22 and 19; Italy: C. C. (1942) Disp. Prel. art. 20 par. 2.

⁵² This however has been proposed by WEISS, 4 *Traité* 126; BATIFFOL, 1 *Répert.* 255 no. 23.

⁵³ Japan: Law of 1898, art. 19 par. 2; China: Law of 1918, art. 14 par. 2; Finland: Law of 1929, § 26; France: 6 LAURENT 77 no. 39; SURVILLE 464ff. no. 316; PILLET, 1 *Traité Pratique* 652 no. 320. Poland: Law of 1926, art. 19 par. 2, and Greece: C. C. (1940) art. 23 par. 2, extend their reference to the last common nationality to the effects of adoption.

French writers, the law of the child governs the child's position in its natural family, including reciprocal inheritance rights, while the adoptive relationship is determined by the parent's law.⁵⁴ Pillet has, in despair, suggested that the judge be allowed free choice of law.⁵⁵

III. RECOGNITION OF FOREIGN ADOPTION

I. Conditions of Recognition

The above described English and American jurisdictional rules seem to imply that a foreign adoption will be recognized, if the jurisdiction assumed by the foreign state is based either on the adopter's domicile or, in the American view, on the domicile of the child. It is true that, not even among the sister states, does this principle appear clearly settled. The Supreme Court of the United States has had occasion to proclaim that the Federal Constitution did not oblige a state to recognize legitimations and adoptions made in another state.⁵⁶ The underlying doubts are connected, however, with the specific effect of adoption upon inheritance rather than with the principles of recognition. It seems that there is no serious question respecting recognition in general.

Whether in addition to the two grounds for jurisdiction mentioned above, adoptions occurring in the national state of the adopter are to be recognized, may be questioned. There is no compelling reason for recognition, for instance, where an American child resident in the United States is adopted in a

⁵⁴ 2 FIORE 296, 297, 298 no. 752; DESPAGNET 850 no. 286; VALÉRY 1153 no. 814; NIBOYET 778 no. 665. This solution has been reproduced in Código Bustamante art. 74 with the modification that the adopter's law governs "in so far as his estate is concerned," and that of the adopted person "in respect to the name, the rights and duties which he retains regarding his natural family, as well as to his own estate in regard to the adopting person," while the right to maintenance is left to public policy (art. 76).

Contra: see RAAPE 594.

⁵⁵ PILLET, *Principes* 324 no. 154, renouncing any rule.

⁵⁶ *Hood v. McGehee* (1915) 237 U. S. 611.

German court⁵⁷ pursuant to German law by a German domiciled and resident in the United States.⁵⁸

Exclusive jurisdiction is claimed over nationals by the frequently cited Austrian and Hungarian traditions⁵⁹ and by the Scandinavian states. Swedes and Norwegians cannot be adopted abroad without permission of the king.⁶⁰ Finns need the permission of their Minister of Justice.⁶¹ Other states generally reserve judicial activity in status matters of nationals to their own tribunals. France and Belgium require that nationals should seek supplementary authorization at their home court.⁶² Italy subjects recognition even to the procedure of exequatur.⁶³ Recently the National Socialist innovations in German adoption law have inspired the view that a foreign adoption of a German always needs confirmation by a German court in order to have effect in that country.⁶⁴

Opposition of public policy to foreign adoptions has formed a natural problem in countries in which no form of adoption has been instituted. In England, which until recently belonged in this category, no case has occurred, but Dicey pronounced his decided opposition to the recognition of any foreign adoption and impressed Beale and the American Restatement with this theory. This influence, together with the common law tradition, repugnant to adoption, was strong enough to prevent recognition of an American adoption in Canada even after the Canadian reform laws, on the ground

⁵⁷ § 66 par. 2 of the German Law on Voluntary Jurisdiction.

⁵⁸ KIPP, in KIPP-WOLFF, Familienrecht § 99 n. 12.

⁵⁹ Austria: *supra* p. 398; Hungary: SCHWARTZ, 41 Z.int.R. (1929) 107 at 182.

⁶⁰ Sweden: Law on Adoption of June 14, 1917 with amendments, § 26 par. 2; Norway: Law on Adoption of April 2, 1917 as amended by laws of Sept. 23, 1921, and May 24, 1935, § 29 par. 2.

⁶¹ Finland: Law of 1929, § 24 par. 1 sentence 2.

⁶² ROLIN, 2 Principes 171 no. 637; *Novelles Belges*, 2 D. Civ. 659 no. 149.

⁶³ Cass. civ. (June 24, 1932) *Monitore* 1932, 929, *Clunet* 1933, 454; *cf.* App. Genova (Dec. 16, 1932) *Monitore* 1933, 225.

Contra for France, WEISS, 4 *Traité* 130.

⁶⁴ RAAPE, 2 D. IPR. 220.

that this legislation had no retroactive effect.⁶⁵ The court, using this argument, overlooked that not the reform law but the strength of the present public policy was in question. In the Netherlands, foreign adoptions seem to be recognized when the national laws of both parties permit it, but naturally not when one party is of Dutch nationality.⁶⁶

Remarkably, the opposite liberal view has been taken in Portugal,⁶⁷ Argentina,⁶⁸ and Guatemala.⁶⁹

In countries with adoption, the domestic law is frequently applied to a foreign adoption to which a subject of the forum is a party, at least insofar as it is thought that this individual must be protected. In France and in Latin countries,⁷⁰ public policy is invoked in such cases for almost all internal conditions of adoption as being of "international public order."

Adoption between foreigners in their own national states should be and is regularly recognized without any such limitations.⁷¹ But a French decision was concerned with the following case: A Russian married couple, the husband forty-nine, the wife forty-five years old, adopted in 1912 in Russia a child of twelve years. The transaction was perfectly valid under Russian law; it would not have been allowed under article 343 of the French code, as it stood at that time, requiring a fifty-year age of the adopter and full age of the adopted per-

⁶⁵ *Burnfiel v. Burnfiel* [1926] 2 D. L. R. 129; Haultain, C. J. S., in this strange decision acknowledged that the case was absolutely similar to that contrarily decided in *In re Throssel* [1910] 12 W. L. R. 683. In both cases the adoption had been made by decree in Iowa.

⁶⁶ VAN HASSELT, 6 Répert. 635 no. 203.

⁶⁷ See Sup. Trib. Lisbonne (May 15, 1934) *Nouv. Revue* 1935, 424; *supra* pp. 177-178.

⁶⁸ See 2 VICO 128, no. 172.

⁶⁹ MATOS 394 no. 277.

⁷⁰ France: Trib. civ. Valenciennes (June 18, 1914) *Clunet* 1919, 242. Italy: App. Palermo (June 12, 1931) 24 *Rivista* (1932) 563, *Clunet* 1933, 1091. VALÉRY 1151 no. 812.

⁷¹ Denmark: BORUM and MEYER, 6 Répert. 221 no. 56.

The Netherlands: Rb. Amsterdam (April 7, 1920) W. 10632 (child of foreign nationality born in the Netherlands).

son. Instead of simply recognizing the foreign act, the court of Paris declared it effective only because in the meantime the French provision had been changed so as to require forty years of the adopter and fifteen years of age difference.⁷² The implied claim to control an entirely foreign act by the municipal law of the forum is absurd.

2. Effects of Recognition

Where no obstacle arises from jurisdictional considerations or public policy of the forum, it may yet be dubious to what extent the foreign created adoption is effective at the forum. The only consistent solution of this question is given in such statutes as that of Quebec:

"A person resident outside of the Province who has been adopted according to the laws of the United Kingdom or any part of the British possessions other than the Province of Quebec or of any foreign country, shall possess in this Province the same rights of succession that he would have had in the said United Kingdom or part of the British possessions or in the said foreign country in which he was adopted."⁷³

The French-Belgian doctrine has always supported the clear principle that the effect of adoption is governed by the applicable foreign law.⁷⁴

The Swiss Federal Tribunal in a quite recent case has left no doubt on the application of the Swiss intestate portion for legitimate children (including adopted children), to a girl adopted in Moscow in 1912. It expressly states that her adoption had taken place according to the then Russian law "not

⁷² Cour Paris (Jan. 2, 1936) *Gaz.Pal.* 1936.1.551, 7 *Giur. Comp. DIP.* 159 no. 83, criticized by BATIFFOL, *Revue Crit.* 1937, 427, but apparently approved by COSTE-FLORET, 7 *Giur. Comp. DIP.* 160.

⁷³ Quebec: 14 *Geo. V*, c. 75 s. 14 (1924) as amended by 25-26 *Geo. V*, c. 67 s. 2 (1935), *R. S.* 1941, c. 324 s. 22.

Similar, Alberta, *Infants Act*, 1913 (2), c. 13, s. 33, and *Domestic Relations Act*, *R. S. A.* 1942, c. 300, s. 49; unification proposed by 1 JOHNSON 353.

⁷⁴ WEISS, 4 *Traité* 118; 6 LAURENT 75 no. 37; ROLIN, 2 *Principes* 172 no. 638.

only as a so-called contractual adoption without inheritance right, but as a fully operating one conferring rights equal to those of a legitimate child.”⁷⁵

Indeed, foreign adoptions should be recognized, if at all, to exactly the extent to which they have been created as measured by the entire legislation of the state of adoption; they should not be given either more or less effect. One would think that in the United States the same solution must smoothly flow from the recognition of adoption orders rendered by the domiciliary court either of the parent or the child, but things have taken another course. The question has been much discussed in this country and recently also a little in German literature.

Before entering into the main subject of the controversy regarding inheritance rights, it may be permissible to indicate the points where disturbances seem to have set in.

(a) General attention has been devoted to the problems of recognition arising in the succession upon death to the adopted parents or sometimes to the adopted child, or to property of the natural parents. It should be noticed, however, that statutes on adoption differ widely also on other points such as alimentary support *quoad* the child's consanguineous family, the paternal power of the natural father, the name of the child, *et cetera*. In the United States, many statutes terminate the effects of the natural parent-child relation in the case of adoption, while others make it “exceedingly difficult to find in the legislative pronouncements any intent to work a complete severance of parental relationship and substitution of parent.”⁷⁶

Again, the effect of adoption between the adoptive parties seems reduced in South Carolina to property rights,⁷⁷ and

⁷⁵ BG. (Oct. 21, 1943) 69 BGE. II 357, 363.

⁷⁶ 4 VERNIER § 261 at 406; *cf.* Suppl. 127ff.

⁷⁷ South Carolina Code of Laws 1942, C. C. § 8679.

courts in Mississippi may limit the right of the adopted child to certain benefits.⁷⁸

If we face this broad field, recognition of the foreign act with its proper effects appears to be the only suitable maxim. Certain countries, of course, headed by France, will indulge in large exceptions, also in this respect, on the ground of public policy.⁷⁹

(b) The reluctance of the Dutch and English jurists in earlier periods to conceive an extraterritorial effect of judicial acts and to acknowledge a "status unknown to the forum," as we have seen, finally resulted in the similarity doctrine, expressed by the Restatement in § 143:

"The status of adoption, created by the law of a state having jurisdiction to create it, will be given the same effect in another state as is given by the latter state to the status of adoption when created by its own law."⁸⁰

The foregoing section probably was exclusively influenced by consideration of inheritance problems. Another section, § 305, expresses a second time the same idea in application to distribution; the adopted person shall be treated "as if he were a natural-born legitimate child of his adoptive parent if the law that regulates distribution gives such effect to adoption."

Even in limitation to the problems of distribution, it is amazing, not only that no foreign adoption should be recognized in a country not knowing adoption, but also that every foreign adoption of whatever extent should be treated like a full adoption, if the law governing inheritance does so with respect to adoptions performed within the state.⁸¹ This unexpected

⁷⁸ Miss.: Code Ann. (1942) § 1269, *cf.* 4 VERNIER § 261 at 406.

⁷⁹ *Cf.*, for instance, on aliments: WEISS, 4 *Traité* 120; BATIFFOL, 1 *Répert.* 256 no. 25; prohibition to marry (C. C. art. 354): 2 FIORE 39 no. 539; BATIFFOL, 1 *Répert.* 256 no. 26; on C. C. arts. 343-346 (before reform): VALÉRY 1151 no. 812; BATIFFOL, *Revue Crit.* 1937, 427.

⁸⁰ 2 BEALE § 143.1 classifies, correspondingly, the cases along the distinction whether or not the adopted foreign child is treated like a child adopted at the forum.

⁸¹ See the critical analysis by YNTEMA, "The Restatement of the Law of Conflict of Laws," 36 *Col. L. Rev.* (1936) 212.

dogma has certainly not found favor with American courts, but it does contribute to obscure the picture. It has caused, at least, more readiness to recognize an adoption similar to the domestic type than a dissimilar one, which is an unfortunate starting point.

Certain Canadian statutes avoid enlarging the rights created by foreign adoption, but they share the main rule of the Restatement. For instance, the Ontario statute provides that:

"A person . . . adopted in accordance with the laws of the province where he is domiciled, shall be entitled to the same rights of succession as to property in Ontario as he would have had in the province in which he was adopted but not exceeding the right he would have had if adopted under this Act."⁸²

(c) Faced with their usual topic, viz., the share to which foreign adopted children are entitled in a succession, American courts have decided from case to case, as results seemed warranted by the circumstances, although in some instances they have been influenced by the formalistic arguments frequent in English and Canadian courts. Unfortunately, a theoretical point has been introduced. The courts and their annotators usually distinguish whether a right to inherit by or from an adopted person has been established by the state where the adoption has been performed and, if so, whether the statute giving the right is an adoption statute or an inheritance statute. To illustrate, it has been said in a remarkably explicit note that, if the right of inheritance has been limited in the state of adoption, the restriction may be imposed either upon the status or upon the right to succession. The first is to be presumed, if the child, by the statute of the state of adoption, has been granted the full position of a natural child in relation to the

⁸² Ontario (1927) 17 Geo. V, c. 53 s. 13, re-enacted R. S. O. 1937, c. 218 s. 13.

Similar, British Columbia, Adoption Act, R.S.B.C. 1936, c. 6 s. 11; Prince-Edward Island, Adoption Act, 1930, c. 12 s. 15 and Children's Act (1940) c. 12, s. 124.

adopter, but not to his collateral relatives; this limitation, then, has to be recognized in the state of inheritance. Where, however, adopted children are placed in second rank, to favor the legitimate issue primarily entitled, the limitation concerns the hereditary right.⁸³

It is submitted that the courts are facing an impossible task with this method. It suffices to observe what distinctions, verbal interpretations, and inferences a modern author has felt obligated to propose, "in order to decide whether a right asserted by a claimant should be treated as one which flows from status, if at all, or as one which is given irrespective of the existence or non-existence of status."⁸⁴ More appropriately, it has been repeatedly asserted that statutes of adoption and statutes of inheritance of the same state must be read together. In fact, the entire effect of adoption is either defined at one place in the laws, namely, in the chapter on adoption, or has to be deduced from both categories of statutory provisions taken together. Usually, there is neither any legislative intention nor any sound reason for presuming by interpretation, that one group of provisions should govern only domestic adoptions and the other foreign adoptions, or that one group should prevail in the domestic courts only and the other have extraterritorial effect. Nor is it the task of these internal provisions to make such distinctions. It is up to the law of conflicts to find the solution. As has been contended above, the entire legislation of the state of adoption defines the effects to be recognized.

(d) Two practical considerations may guide us. On the one hand, it is inadmissible that an adopter could change the effect of an adoption by changing his domicile. He would be able to do just that, if the statute of distribution at his last domicile

⁸³ L. R. A. 1916 A 668; similar for legitimation 73 A. L. R. 958.

⁸⁴ TAINTOR, "Legitimation, Legitimacy and Recognition in the Conflict of Laws," 18 Can. Bar Rev. (1940) 589, 691, at 703. RAAPE 592 attempts similar distinctions.

were given predominance in construing the previously made adoption. On the other hand, an adopter who has not by the adoption created inheritance rights is free to maintain the effects of the transaction or to supplement them by gift or by will, so far as the statute of distributions allows him. It is no natural task of conflicts law to demolish these results of private law.

3. Effect on Inheritance Rights in Particular

In order to distinguish the scope of the conflicts rule on adoption from those concerning succession upon death, it is justly said that the law governing succession determines whether adopted children as a class are competent to succeed, and the law governing the creation of adoption determines whether a certain person is an adopted child.⁸⁵ This, however, does not answer all questions.

(a) *Construction of language.* Where a testator has devised or bequeathed property to his or other people's "children" or "issue," it was argued, especially in Canadian cases, that children or issue born in wedlock are meant. This was contended even after the introduction of adoption into the legislation, at least in construing older wills.⁸⁶ The traditional opposition of the common law to adoption was still effective, though in British Columbia the contrary opinion was followed even where a will used the term "heirs."⁸⁷ It may now be assumed that the intention underlying a will or deed is to be

⁸⁵ See for instance GOODRICH, "Legitimation and Adoption in the Conflict of Laws," 22 Mich. L. Rev. (1924) 637 and Handbook 384 ff.; LORENZEN, 6 Répert. 349 no. 342; Notes, L. R. A. 1916 A 666 and 65 L. R. A. 186.

Germany: RAAPE 591 ff. and RAAPE, "Les rapports juridiques entre parents et enfants," 50 Recueil 1934 IV 401, 508 no. 81.

⁸⁶ Supreme Court of Canada: Donald, Baldwin & Mooney [1929] 2 D. L. R. 244 (Washington adoption).

Ontario Supreme Court: *R v Skinner* (1929) 64 O. L. R. 245, [1929] 4 D. L. R. 427 (Ohio adoption). See FALCONBRIDGE, Cases on the Conflict of Laws (ed. 4, 1938) 170.

⁸⁷ *In re McGillivray, Purcell v. Hendricks* [1925] 3 D. L. R. 854.

construed according to the mere factual circumstances, and statutes are not to be deemed any longer to demand legitimate birth or blood relationship.

(b) *Major rights acquired by foreign act.*⁸⁸ A group of cases is characterized by larger rights granted in the state of adoption than in the state of distribution. In particular, the statute applicable to the succession may be wholly ignorant of the kind of adoption accomplished abroad. We have to distinguish as follows:

(i) *Law of situs of immovables.* A social and ethical background such as lay behind the famous Statute of Merton (A.D. 1236)⁸⁹ and still continued at the time of the English case of *Birtwhistle v. Vardill* (A.D. 1840)⁹⁰ may well have required birth in lawful wedlock as the sole title to succession to land. This conception, however, seems finally to have lost its hold in the English land law. But it survives strangely in the Alabama courts,⁹¹ while in Florida foreign adopted children are excluded unless they become citizens of the state.⁹² The Supreme Court of Mississippi overruled its former acceptance of this conception in 1917 with the express denial of a public policy preventing the adopted child from inheriting.⁹³ Surprisingly in one decision, the French Court of Cassation also applied the law of the situs rather than that governing adoption, as a pretext for sticking to French law.⁹⁴

⁸⁸ See YNTEMA, 2 Giur. Comp. DIP. 358 sub (C).

⁸⁹ 20 Henry III, c. 9 (1236).

⁹⁰ 7 Cl. and F. 895.

⁹¹ *Brown v. Finley* (1908) 157 Ala. 424, 47 So. 577; cf. on legitimation the *Lingen* case (1871) 45 Ala. 410, *supra* p. 585, n. 157.

⁹² *Tankersley v. Davis* (1937) 128 Fla. 507, 175 So. 501.

⁹³ *Brewer v. Browning* (1917) 115 Miss. 358, 76 So. 267, overruling *Fisher v. Browning* (1914) 107 Miss. 729, 66 So. 132.

⁹⁴ Cass. (req.) (April 21, 1931) D.1931.1.52, S.1931.1.377, *Clunet* 1932, 142, *Revue* 1932, 526; *Contra*: BARTIN, "Adoption et transmission héréditaire," *Clunet* 1932, 5, NIBOYET, *Decision note*, *Revue* 1932, 541. Favorable to the decision, however, WENGLER, 8 *Z.ausl.PR.* (1934) 167 n. 1; LEWALD, *Règles générales des conflits de lois* (1941) 137.

(ii) *Local policy*. Apart from such peculiar prohibitive policy claimed for the laws of succession and leaving aside the bulk of the cases, which offer no problem because both states involved grant similar positions to adopted children,⁹⁵ there is authority denying that local policy should normally intervene.⁹⁶

This view was applied to the problem of inheritance from natural parents. In *Slattery v. The Hartford Connecticut Trust Company*,⁹⁷ an individual adopted in Michigan claimed his share in his natural father's estate and was successful in Connecticut. The statute of Michigan maintains, that of Connecticut terminates, the right of inheritance of an adoptee from his native parents. The Supreme Court of Errors of Connecticut held that, as the right of inheritance of the child was not lost by the statute of Michigan, he could claim it; the legislature of Connecticut debarring a child from such a right "has not attempted to lay down any rule applicable in the case of children coming here from another state where they have been adopted under laws which do not take away that right."⁹⁸ This argument is equivalent to saying, as we did, that the extension of the inheritance rule to foreign cases with foreign elements is up to the conflicts rule, and that, under this rule, adoptions made in the domiciliary state must be recognized with their own effects. The restriction imposed on the statute by this conception is not only equitable and justified by the anomalous structure of the Connecticut type of adoption,⁹⁹ but consistent with the advisable general postulates.

⁹⁵ See YNTEMA, 2 *Giur. Comp. DIP.* 357 sub (A).

⁹⁶ For this opinion also FALCONBRIDGE, 3 *Giur. Comp. DIP.* no. 85 p. 171. *In re Finkenzeller's Estate* (1929) 105 N. J. Eq. 44, 146 Atl. 656; Keegan v. Geraghty (1881) 101 Ill. 26.

⁹⁷ *Slattery v. The Hartford-Connecticut Trust Co.* (1932) 115 Conn. 163, 161 Atl. 79, commented by YNTEMA and DE NOVA in 2 *Giur. Comp. DIP.* 352 ff. no. 169.

⁹⁸ There follow excellent explanations why public policy is not contrary to recognizing such a provision "dissimilar" to the domestic regulation.

⁹⁹ See YNTEMA, 2 *Giur. Comp. DIP.* 359, against criticism of the decision in 81 U. of Pa. L. Rev. (1932) 213.

The case demonstrates with particular clarity the necessity of protecting by adequate conflicts rules those legal effects which the parties to a transaction were entitled to foresee.

Yet the contrary view was recently taken by the Superior Court of Pennsylvania¹⁰⁰ refusing intestate succession to grandchildren from their natural grandmother through their mother adopted by unrelated persons in Ohio. The Court construed section 16 (b) of the intestate statute of Pennsylvania, excluding adopted children from taking from or through their natural parents, to the effect of including all foreign adopted children and their issue. This thesis is not justified by the argument that "to hold otherwise would create a power in another state to limit and nullify the authority of this state to determine for itself how property shall descend on intestacy." The intention of the Pennsylvania statute cannot be changed by another state, but why should a statute intend implicitly to exclude foreign adopted children whose adoption did not abolish their status in their natural families where it was done? The only sound method is to leave the application of the intestate statute to the conflicts rule which should not be dubious.

The climax, so to speak, of incomity seems reached by *Frey v. Nielson*,¹⁰¹ where an inheritance statute of New Jersey admitting adopted children was construed to be restricted to children adopted in New Jersey. Also, in the Netherlands, where a foreign party has acquired Dutch nationality, a former adoption of or by this party will not be recognized.¹⁰² This refusal, however, is not ascribed to the Dutch statute of distribution; it denies the entire family law relationship by adoption and is based on public policy regarding Dutch nationals.

¹⁰⁰ *In re Crossley's Estate* (1939) 135 Pa. Super. Ct. 524, 7 Atl. (2d) 539; noted 24 Minn. L. Rev. (1940) 268.

¹⁰¹ *Frey v. Nielson* (1926) 99 N. J. Eq. 135, 132 Atl. 765; the Note, "Conflict of Laws-Inheritance by Adopted Child," 25 Mich. L. Rev. (1926) 189 is uncritical.

¹⁰² VAN HASSELT, 6 Répert. 636 no. 203.

Another outstanding case, *Brown v. Finley*,¹⁰³ has been sharply criticized by European writers.¹⁰⁴ The Alabama court refused a right of distribution to a person adopted in Georgia, because the adoption had not been registered at the probate court as required in Alabama, though not in Georgia. The refusal has been called a denial of international private law.

(c) *Major rights granted by the statute of distribution.* Where inheritance rights are conferred by the law of succession and denied by the law presiding over adoption, in a logical solution the original effect of the act cannot be enlarged by the law of another state. This some American cases state.¹⁰⁵

Opposition, in part, is based again on the formal argument that a foreign statute depriving an adopted child of inheritance is a statute of distribution and as such not susceptible of extraterritorial application.¹⁰⁶ There is no proof for that assumption, and the result comes as a startling surprise to the parties. Where an English woman has adopted an English child in England, all parties, at least their solicitors, have understood that no right upon death was implied; why should the legal situation be reversed by the woman's moving to New Hampshire and dying there?¹⁰⁷

Some decisions, however, are based on quite different considerations that flow from a sound policy. The statute of

¹⁰³ *Brown v. Finley* (1908) 157 Ala. 424, 47 So. 577, reproduced in 22 Z.int.R. (1912) 164.

¹⁰⁴ LEWALD, "Question de droit international des successions," 9 Recueil 1925 IV 75 n. 3; RAAPE, "Les rapports juridiques entre parents et enfants," 50 Recueil 1934 IV 509 n. 1.

¹⁰⁵ *Estate of Sunderland* (1882) 60 Iowa 732, 13 N. W. 665; *Meador v. Archer* (1889) 65 N. H. 214; *Shaver v. Nash* (1930) 181 Ark. 1112, 29 S. W. (2d) 298; *Shick v. Howe* (1908) 137 Iowa 249, 114 N. W. 916; *Ross v. Ross* (1878) 129 Mass. 243, 37 Am. Rep. 321; *Boaz v. Swinney* (1909) 79 Kan. 332, 99 Pac. 621, overruled in *In re Riemann's Estate* (1927) 124 Kan. 539, 262 Pac. 16, *infra* n. 110.

See Note, 73 A. L. R. 961, 973; YNTEMA, 2 Giur. Comp. DIP. 357; WENGLER, 8 Zausl.PR. (1934) 163 n. 2.

¹⁰⁶ This argument is invoked by STUMBERG, 310; also RAAPE, 50 Recueil 1934, IV 509 no. 82.

¹⁰⁷ Thus far of the same opinion RAAPE, 50 Recueil 1934, IV, 511 no. 85.

distribution may allow a share to all children, inclusive of illegitimates, so as to eliminate any discrimination among children.¹⁰⁸ Furthermore, courts have resorted to a permissive public policy in cases in which adoptive children were a class of persons entitled in the forum; explanation of the child's unfavorable treatment by the statute creating adoption is found in an antiquated prejudice against bastards.¹⁰⁹ Thus, in *In re Riemann's Estate*, the Illinois statutory provision, denying the child's relationship with the relatives of the adopter, was considered a "peculiar discrimination," repugnant to the "generous spirit" underlying the law of Kansas.¹¹⁰ In *Pfeifer v. Wright*,¹¹¹ the progressive view was expressly directed against the tradition extending from the Statute of Merton to such cases as *Keegan v. Geraghty* and *Frey v. Nielson*.

But public policy should not be overdone. The Mississippi court says poignantly:

"It would be unjust to both parent and child, to hold that the mere fact of moving to another state would upset and unsettle this relationship. It is of the utmost importance that the status of this character should be maintained so far as it is possible. . . ." ¹¹²

¹⁰⁸ *In re Crowell's Estate* (1924) 124 Me. 71, 126 Atl. 178 (an "adoption into the family" in Nova Scotia had no legal significance in this province, but fulfilled the conditions for inheritance in Maine).

¹⁰⁹ *Anderson v. French* (1915) 77 N. H. 509, 93 Atl. 1042 (estate of adopter); *Calhoun v. Bryant* (1911) 28 S. D. 266, 133 N. W. 266 (estate of adoptive child).

¹¹⁰ *In re Riemann's Estate* (1927) 124 Kan. 539, 262 Pac. 16.

¹¹¹ *Pfeifer v. Wright* (1930) 41 F. (2d) 464.

¹¹² *Brewer v. Browning* (1917) 115 Miss. 358 at 369, 76 So. 267, overruling *Fisher v. Browning*, *supra* n. 93.

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